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ENGLISH REPORTS

IN LAW AND EQUITY:

CONTAINING REPORTS OF CASES IN THE

House of Lords, Privy Council,

COURTS OF EQUITY AND COMMON LAW;

AND IN THE

Admiralty and Ecclesiastical Courts;

INCLUDING ALSO

CASES IN BANKRUPTCY AND CROWN CASES RESERVED.

EDITED BY

EDMUND H. BENNETT & CHAUNCEY SMITH, ESQRS.,
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VOLUME III.

Containing Cases in the House of Lords, Privy Council, and in all the Courts of Equity and Common Law, in Mich. Term, 1850, and Hilary and Easter Terms, 1851.

BOSTON:

CHARLES C. LITTLE AND JAMES BROWN.

1851.



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DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS
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A

T A B L E

OF THE

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IN THE
HOUSE OF LORDS;

DURING THE YEARS 1850 AND 1851.

[*Before LORD BROUGHAM and other LORDS.*]

PRENDERGAST *v.* PRENDERGAST.¹

August 6, 7 and 9, 1850.

*Will, Construction of — Conversion — Foreign Securities — Trustees,
discretionary Powers in.*

A testator, who was possessed of a large personal estate, consisting of various foreign securities, with the exception of a small sum of ready money, bequeathed to his trustees so much of his personal estate and effects as, at the time of his decease, should produce the clear annual income of 1500*l.*; and he directed that the same should be selected, and appropriated, and set apart, as soon as conveniently might be after his decease, by his trustees or trustee, in their uncontrolled discretion; and that the trustees or trustee should stand possessed of the personal estate and effects so to be appropriated, &c., upon trust to pay the interest, dividends, and annual produce thereof, half yearly, to his wife during her life; after her death, to sink into the residue; with a direction, that if the interest or dividends should, from any cause, be increased or reduced in amount, his wife should have the increase, or bear the loss. The residue of his estate and effects he gave upon certain trusts for his children, and he gave his trustees or trustee for the time being the fullest discretion to leave his property invested on foreign securities, but with full powers to alter and vary the securities as they should think fit. One executor only proved the will, the others being abroad: he paid the testator's debts, and a legacy given by the will, but, in consequence of disputes arising between the widow of the testator and some of the residuary legatees as to the construction of the will, he declined to exercise his discretion as to appropriating a sufficient amount of the testator's estate to meet the annuity of 1500*l.* given to the widow, and refused to exercise his discretion except under the direction of the Court of Chancery. In consequence of this the annuitant filed her bill to have a sufficient amount of the foreign securities sold, and the proceeds invested in the 3*l.* per cents., so as to yield an annuity of 1500*l.* Wigram, V. C., decided in favor of the annuitant, which decision was affirmed, on appeal, by Lord Cottenham, C.:—

Held, upon the construction of the entire will, *first*, that the gift of the annuity was not a specific gift of so much of the foreign securities as, at the time of the testator's decease, should produce an annual income of 1500*l.*

Secondly, that the executor and trustee having refused to exercise his discretion as to the appropriation of part of the estate to meet the annuity of 1500*l.*, the Court of Chancery could not exercise any discretion in the matter, but must follow its known rule, and order

¹ 14 Jur. 989.

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an investment in the 3*l*. per cents., unless there was some clear direction of the testator to the contrary.

Thirdly, that it was not to be collected from the will, that it was the intention of the testator that the foreign securities should be set apart to provide for the annuity.

THIS was an appeal from so much of a decree made by Wigram, V. C., dated the 28th of April, 1845, as referred it to the master to inquire what parts of the estate of the testator, Guy Lenox Prendergast, were then outstanding, and invested in any and what foreign stocks or securities, and whether such parts of the said testator's estate, or any or what part thereof, ought to be sold, and that such parts thereof as the master should be of opinion ought to be sold should be sold by the defendant Harris Prendergast, the only acting executor and trustee of the will of the testator; and against so much of two orders on further directions, made by Wigram, V. C., dated respectively the 21st of January, 1846, and the 9th of July, 1846, as declared, that, according to the true construction of the will of the said testator, his widow, Eliza Emma Prendergast, was entitled to have so much of the personal estate of the said testator invested in bank 3*l*. per cent. annuities as should be sufficient to produce a clear income of 1500*l*. per annum; and whereby it was referred to the said master to inquire and state to the court what parts of the personal estate and effects of the said testator ought, having regard to the interest of all parties, to be sold for the purpose of purchasing bank 3*l*. per cent. annuities sufficient to answer such annuity as aforesaid; and whereby it was ordered that the said master should inquire and state to the court whether it will be for the benefit of the infant defendants that the residue of the personal estate and effects of the said testator, or any or what part thereof, should be sold, or left on the then present securities, or what should be done therewith; and against a decree of Lord Cottenham, C., dated the 21st of January, 1847, in so far as the said order of the 9th of July, 1846, was thereby affirmed.

The questions arose upon the will of Guy Lenox Prendergast, dated the 3d of April, 1839, whereby, after directing payment of his debts, funeral and testamentary expenses, and bequeathing to his wife, the respondent Eliza Emma Prendergast, the sum of 2000*l*. sterling, together with a leasehold house, furniture, and other effects, as therein mentioned, and confirming the settlement made upon his marriage with the last-named respondent, he bequeathed as follows: "I give and bequeath to my trustees, hereinafter named, so much of my personal estate and effects as, at the time of my decease, shall produce the clear annual income of 1500*l*.; and I direct that the same shall be selected, and appropriated, and set apart, so soon as conveniently may be after my decease, by my said trustees, or the trustees or trustee for the time being, or the majority of them residing in England, in their uncontrolled discretion. And I direct that my said trustees, and the trustees or trustee for the time being, under this my will, do and shall stand and be possessed of the personal estate and effects so to be appropriated and set apart, upon trust, to pay the interest, dividends, and annual produce thereof, by equal half-yearly payments, unto my said dear wife, during her life, if she shall so long continue my widow,

the first of such half-yearly payments to begin and be made at the end of six calendar months next after my decease. And from and after the decease or second marriage of my said wife, I direct that the personal estate and effects which shall be so appropriated and set apart, or the stocks, funds, or securities, in or upon which the same shall then be laid out or invested, shall sink into and become part of my residuary personal estate. And I direct, that in case the yearly interest, dividends, and annual produce of the personal estate and effects so to be appropriated and set apart as aforesaid, or the stocks, funds, or securities in or upon which the same shall or may, at any time or times hereafter, be laid out or invested, shall, from any cause whatever, be increased or reduced in amount during the time, the same are hereby directed to be paid to my said wife, then and in such case my said wife shall be entitled to have and receive such increased or reduced interests, dividends, and annual produce, as the case may be, in lieu and satisfaction of the interest, dividends, and annual produce hereinbefore directed to be paid to her. And I give and bequeath *all the rest, residue, and remainder* of my estate and effects, whatsoever and wheresoever, or of what nature or kind soever, *not hereinbefore disposed of*, unto my said trustees hereinafter named, their executors, administrators, and assigns, upon trust, that they, my said trustees, or the trustees or trustee for the time being, do and shall divide the same equally between and among all and every my children who shall be living at the time of my decease, whether by my first or second marriage, in equal shares and proportions; the share or shares of such of my daughters living at my decease as shall be married, to be paid to them respectively, for their own sole and respective use and benefit, and their own receipt alone, or together with their respective husbands, to be a good and effectual discharge to my said trustees or trustee; and the share or shares of such of my said children living at my decease, as being sons shall be under the age of twenty-one years, or being daughters shall be under that age and unmarried, to vest in manner following, that is to say, to vest in such of them as shall be sons on their respectively attaining the age of twenty-one years, and to vest in such of them as shall be daughters, on their respectively attaining that age, or marrying, with the consent of their guardians, or the majority of them then resident in England. And I do hereby declare that the several provisions hereby made for my said wife, and for my children by my second marriage, are in addition to the benefits they may respectively be entitled to under my said marriage settlement."

And after making provision for the maintenance and advancement of such of his children whose shares should not have become vested at the time of his decease out of their expectant shares therein mentioned, the said testator further declared as follows: "And I hereby direct that it shall be and may be lawful for, and I do hereby expressly authorize and empower, my said trustees, and the trustees or trustee for the time being, under this my will, or the majority of them, resident in England, at their own discretion, to permit the whole or any part of my personal estate to remain and continue on such securities as the same may happen to be invested upon at the time of my decease, so

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long as they shall see fit, without being in any way answerable or responsible for so doing. Nevertheless, I do hereby fully authorize and empower my said trustees, or the trustees or trustee for the time being, or the majority of them, resident in England, to sell and absolutely dispose of or convert into money, such part or parts of my personal estate and effects as shall not consist of money or securities for money, and call in, recover, and receive such part or parts of my said personal estate and effects as shall consist of money or securities for money, when and as they, my said trustees or trustee for the time being, shall in their discretion think fit, and to lay out and invest the money so to be raised and received, in the public stocks and funds of Great Britain, or on government or real security, at interest, and from time to time to alter, vary, and transpose the stocks, funds, and securities in or upon which the same shall or may be laid out or invested, and again to reinvest and lay out the money arising thereby upon any new or other or the like stocks, funds, or securities, as often as they, my said trustees or trustee for the time being, or a majority of them, resident in England, shall, in their own absolute discretion, think fit and advisable, and generally to act in the premises in as full and ample a manner as I could do were I living; and I direct that my said trustees or trustee shall stand and be possessed of and interested in all such stocks, funds, and securities, and the dividends, interest, and annual produce thereof, upon such trust and for such intents and purposes as are hereinbefore expressed and declared of or concerning the trust funds and premises, given to or vested in them as aforesaid, and the dividends, interest, and annual produce thereof respectively."

The testator appointed six persons executors and trustees of his will, but one only, namely, the respondent, Harris Prendergast, at first proved the will. The testator died on the 21st of February, 1845, leaving four children by his first wife, him surviving, the appellants in the present case, and his widow, and three children by her, him surviving, four of the respondents in the present appeal. The sole acting executor being desirous of carrying out and performing the trusts and duties he had undertaken, but being unable to do so with safety to himself and satisfaction to the parties interested under the will, in consequence of differences and disputes among them as to his powers and duties, he refused to execute the trusts of the will, as to which disputes existed, unless protected by the decree of the Court of Chancery; whereupon the present suit was instituted by the widow of the testator, the respondent Eliza Emma Prendergast, praying that the trusts of the testator's will might be performed and carried into execution under the direction of the court; and that it might be declared that the plaintiff was entitled to have so much of the testator's personal estate and effects set apart, appropriated, invested, and secured in the public stocks or parliamentary funds of this country, or upon real security in England, as would yield a permanent annuity or clear yearly sum of 1500*l*.

The executor, by his answer, stated that he had, out of the assets of the testator which he had possessed himself of, paid the testator's

funeral and testamentary expenses and debts, and the legacy of 2000*l.* given by the will to the complainant. He admitted that he had refused to carry out and execute the other trusts then reposed in him by the said testator's said will as such sole acting trustee and executor, and had refused to select, appropriate, and set apart so much of the said testator's personal estate as, at the time of his decease, produced a clear annual sum of 1500*l.*, and generally to carry into execution the trusts of the said testator's will; and he submitted that there was so much obscurity and difficulty in the language of the will, that he was advised that it would be hazardous should he take upon himself the execution thereof without the assistance and protection of the court; and he stated, "that, upon receiving the assistance, protection, and indemnity of this court in so doing, he is ready and willing, and hereby offers, to act in the premises as this court shall be pleased to order." The appellants, the children of the first marriage, were not before the court, being out of the jurisdiction. By the master's report it appeared, that with the exception of the leasehold house, which he had bequeathed to his widow, and a sum of money at his banker's, which was only sufficient to pay the legacy of 2000*l.* to his widow, the testator's property consisted altogether of foreign securities. Upon the appellants coming to this country after the first decree of Wigram, V. C., they were allowed, upon application to the court, to appear and put in their answer, and the decree on further directions was made in their presence.

By their answer they contended that the intention of the testator, as apparent by the will, was, that the acting executor ought not to sell and dispose of so much of the testator's foreign stocks and securities, or other personal estate, as, when converted into a competent sum of the public funds of Great Britain, or invested upon real securities, would yield a permanent annuity of 1500*l.*, it being the intention of the testator that no portion of his securities should be sold for the purpose of answering the annuity, but that a sufficient portion only of such securities as, invested at the time of his death, should be appropriated and set apart for the purpose of answering such annuity; and that the annual amount to be paid to the said plaintiff in respect of the annuity should thereafter be dependent upon the income from time to time derivable from the securities and personal estate so appropriated for the purpose of answering the same; and that the amount of the said annuity should be dependent upon the annual amount of interest upon the foreign bonds and securities. Wigram, V. C., took a different view of the case, and made the decree of the 24th of January, 1846. (See 11 Jur. 865.) The master, in his report, made pursuant to the references of the 21st of January and the 9th of July, amongst other things, found that it would be for the benefit of the infant defendants that the residue of the personal estate and effects of the said testator should be left on the then present securities, all of which were foreign. The decision of Wigram, V. C., was appealed from, and the case was argued and reargued before Lord Cottenham, C. His lordship, upon the latter occasion, delivered the following judgment:—

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January 21, 1847. LORD CHANCELLOR. In permitting this case to be spoken to, and, as it turned out, to be entirely reargued, I yielded to what I supposed to be the strong opinion of eminent counsel, and not from any doubt which occurred to my own mind as to the opinion which I before expressed. I have, however, so far profited by that reargument, that I have again looked through the will. I have considered the reasons on which the decree of Wigram, V. C., was founded, and I also have now read the pleadings, and I have read, what escaped my attention before, the original decree, which, I think, if it had been attended to, would have formed a very important ingredient in the consideration of this case, that not being the subject of appeal, the appeal being confined to the decree on further directions. Now, without now adverting to the particular expression used, the general object of the will was to give 1500*l.* a year; I will not call it an annuity, because that has been the subject of comment; but the testator meant undoubtedly that his widow should have 1500*l.* a year, payable out of some portion of the estate, and that subject to the payment of that 1500*l.* a year, the property was given to the children of the two marriages, and the sum, whatever it might be, to be set apart to answer the 1500*l.* to the wife, was, after the death of the widow, to fall into the residue. Now, that is the general purport of the will; and the question is, whether that 1500*l.* a year is to be provided for out of the estate in the way in which like provisions of that description usually are, or whether the testator has by his will expressed an intention that it shall be provided for by an appropriation, at the time of his death, of some portion of such funds as might actually then be in a state of investment, and producing income; it must be producing income, otherwise the argument will not hold. No doubt it was quite competent to the testator to make such a provision; it would be a very irrational provision, and it would be one which would be likely to defeat the general object which he had in his will, of producing a life estate for the widow, and afterwards, subject to that life estate, making a provision for the children. Still, if the testator, who was master of his own property, thought proper so to dispose of his property, there can be no doubt as to his competence so to do, and the court would then be bound to carry it into effect, as far as by the rules of the court it was possible to do. But that, of course, is a matter of construction, and without saying that it requires expressions that leave no doubt, it is a construction which the court would not very readily accede to, and would only do so if the intention were so essentially clear as that there could be no doubt of miscarriage in adopting that mode of administering the fund. Now, it is obvious — and that was conceded in the argument — that if that be so, the funds, when set apart, would be funds which could not be afterwards altered during the period of the life of the widow, because it would and must proceed entirely on this supposition, that it is a specific appropriation, either directly by the testator, or through the means which he has directed, and that when that appropriation takes place, it is to all intents and purposes a specific appropriation of the income of the funds so set apart to the wife for her life, and after-

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wards to be divided amongst her children. That would, for the purpose of any discretion which the trustees might have, be just the same as if the testator had directed the income to be enjoyed by the widow for life, and afterwards to go amongst the children. If there be in this will a discretionary power to vary the funds, it might afford at least a strong argument of inference of intention that there was no such specific appropriation of particular funds intended; but the object was to provide for the income of the wife without reference to the appropriation of any such funds as might be existing at the time of the testator's death. If that were the construction of the will, and if the trustees, then having once appropriated the funds, had no discretion afterwards to vary them, if that were so, it then became the separate property for life of the widow, and the court, of course, would have no more discretion to vary the fund than the trustees would have; and the trustees having declined to act, and the duty devolving on the court of doing that which the trustees ought to do, there is no difficulty whatever in the court exercising that discretion, namely, of inquiring which of the funds existing at the time of the death were funds proper to set apart for the purpose of answering the 1500*l.* a year. That would be merely executing the trust—a trust with a specific direction; it would be a trust without a power; there would be none of that discretion to be exercised in the performance of that duty which has been considered as personal to the individual named by the testator, and therefore not capable of being exercised by the court, or devolved to others.

If, therefore, that is the construction, there would be no difficulty in the court executing that; it might execute it by directing the master to inquire which of the funds existing at the time of the death were proper to be set apart for producing the 1500*l.* a year. Now, before I proceed to make any observations on the will itself, I would state what the decree, not the decree on further directions appealed from, but the decree not appealed from, directs, and which, therefore, as the matter stands, must regulate the rights of the parties. After directing the usual inquiries and accounts, it was “ordered that the master should inquire and state to the court what parts of the testator's estate were then outstanding, and invested in any and what foreign stocks or securities, or any and what parts thereof ought to be sold; and it was ordered that such parts thereof as the master should be of opinion ought to be sold, be sold by the defendant Harris Prendergast.”

The court has put a construction on the will, for the court has declared—and that decree, as it stands, is binding on all parties—that if the master shall find that it is not expedient that the property shall remain,—which of course he must find, because he could not find otherwise, although he has not made any report on that part of the case,—if he shall find that it is not expedient that the estate on which the life interest is charged, with remainder to the two families of children, shall remain on the security of these foreign stocks, why then he is, without any further direction of the court, to proceed to sell. How is it possible, in the face of that decree, for this court to

say that that is not the construction of the will, the court having declared that that is the construction of the will? And having dealt with the fund as liable to be disposed of, how can the court say that the funds are not liable to be disposed of? Whether the investment is good or bad, whether beneficial to the tenant for life or to those in remainder, or whether it be not, it must remain in the state in which the testator left it, after once being appropriated, for the life of the widow. If I were of a contrary opinion, on looking at the will, from what I find to be the declaration of the court on the original decree, it might no doubt have created some embarrassment, and have given rise to further proceedings; but that which was the declared opinion of the court, and which now exists as the decree of the court, is quite consistent with the view I take of this will; and without saying there are not expressions in the will which give rise to the argument, and which are not so free from difficulty as other expressions that might have been used, on looking at the whole of this will together, I have no doubt whatever, as I expressed before, that there is no such expression of intention as makes it the duty of the court, or is sufficient to induce the court, if it had the power, to put that very extraordinary construction upon it, namely, of keeping these foreign securities as the means out of which the 1500*l.* a year is to be raised. Now, for that purpose there are not very many parts of the will to which it is necessary to advert. The first clause, and really the principal difficulty here, is, that the testator has, in the different clauses of the will by which he has given these benefits to the different members of his family, apparently separated the funds; at least, he has dealt with a portion of the funds, in the same parts of the will, out of which these several interests are to be derived.

He commences by providing for his wife. He says, first of all, after confirming the settlement, "I give and bequeath to my trustees, hereinafter named, so much of my personal estate and effects as, at the time of my decease, shall produce the clear annual income of 1500*l.*" Now, if it stopped there, no argument could have been raised, because that really would have been the ordinary term. He says, "I give so much of my personal estate as, at the time of my death, shall produce the clear annual sum of 1500*l.*" Then we have only to look, if that be the gift, at what is the mode of investment, according to the rules of this court, what are the funds, in what state of investment ought the funds to be, in order to provide for the tenant for life, where the principal is left to the other persons after the death of the tenant for life. And then he goes on, "And I direct that the same shall be selected, and appropriated, and set apart, as soon as conveniently may be after my decease, by my said trustees, or the trustees or trustee for the time being, or the majority of them residing in England, in their uncontrolled discretion."

Now, I must observe here, the question is not whether the trustees had, by this will, a discretion as to whether they are directed, after once having appropriated the funds to answer the annuity, that they shall remain there; because, if it is merely a matter of discretion whether they should be one fund or another, and the expressions are

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not certainly confined to the funds as they stood at the time of the death, then it is no more than the discretion which the trustees had, and which they declined to exercise, and which devolves on the court; and the court has made a rule in regulating its conduct in the exercise of that sort of discretionary trust. "And I direct that my said trustees, and the trustees or trustee for the time being under this my will, do and shall stand and be possessed of the personal estate and effects so to be appropriated and set apart, upon trust to pay the interest, dividends, and annual produce thereof, by equal half-yearly payments, unto my said dear wife during her life, if she shall so long continue my widow, the first of such half-yearly payments to begin and be made at the end of six calendar months next after my decease; and from and after the decease or second marriage of my said wife, I direct that the personal estate and effects which shall be so appropriated and set apart" — not speaking of funds or securities specifically, but always using the term "personal estate" — "or the stocks, funds, and securities upon which the same shall then be laid out and invested, shall sink into and become part of my residuary personal estate."

Here, then, we have an expression which has been observed upon, and which certainly is entitled to considerable weight. Whatever the intention is as to that existing fund, or the fund to be procured, he certainly contemplates such an appropriation immediately after his death. He now is referring to what the state of the fund might be at the time of the wife's death, and then he speaks of funds or securities in or upon which the sum which is to secure the 1500*l.* a year shall then be laid out and invested, and he directs that it shall fall into and form part of his residuary personal estate. No doubt he might have used the expression without referring to the thing by which the state of investment might be varied at a period immediately following his own death and the death of the wife. Still it is much more consistent with the supposition that he intended that the trustees should have a discretionary power to vary the funds, which trustees ordinarily have, and must have, unless their duty be controlled by the express authority of those from whom they derived their power. "And I direct, that in case the yearly interest, dividends, and annual produce of the personal estate and effects so to be appropriated and set apart as aforesaid, or the stocks, funds, or securities in or upon which the same shall or may at any time or times hereinafter be laid out or invested." Here we have again a repetition of the same event contemplated, namely, "the yearly interest, dividends, and annual produce of the personal estate and effects so to be appropriated and set apart as aforesaid, or the stocks, funds, or securities in or upon which the same shall or may at any time or times hereafter be laid out or invested, shall from any cause whatever be increased or reduced," then the wife is to bear the burden of that reduction, and she is to have the benefit if it be increased. Does he not here contemplate the possibility at least of a variation of the fund? He tells you so. It is not the funds so appropriated; if they shall fall, the wife shall bear the burden; but

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it says, "the fund so to be appropriated and set apart as aforesaid, or the stocks, funds, or securities in or upon which the same shall or may at any time or times hereafter be laid out or invested," and which may, from any cause whatever, be varied. Now, I am looking to see whether there be a clear expression of intention that there should be no variation, and a specific appropriation, and a specific intention of appropriating the fund to answer a particular purpose, which the trustees would not have, without a special direction, the power of varying. The state of investment in both these sentences contemplates a variation of the investment as it may have existed at the time of the appropriation taking place. Now, those are very material passages to be attended to, but not at all containing the whole evidence that there is of the testator's intention; because, when I come to look at the third clause of the will, which gives general powers to the trustees, I find it perfectly consistent with the obvious meaning of these two particular clauses which I have referred to, and quite inconsistent with the supposition that the particular portion of the personal estate required to produce the 1500*l.* a year was no longer to be under the control of the trustees for the purpose of varying the securities, but was unchangeably devoted, during the life of the widow, to remain in the same identical state of investment, for the purpose of answering the annuity of 1500*l.* a year. "And I do hereby expressly authorize and empower my said trustees, and the trustees or trustee for the time being under this my will, or the majority of them resident in England, at their own discretion, to permit the whole or any part of my personal estate;" the very expression used when he directs part of it to be appropriated to produce 1500*l.* a year, not the particular stocks and funds so to be appropriated, but the personal estate, as he describes it. Then he authorizes the trustees "to permit the whole or any part of my personal estate to remain and continue on such securities as the same may happen to be invested upon at the time of my decease, so long as they shall see fit, without being in any way answerable or responsible for so doing. Nevertheless, I do hereby fully authorize and empower my said trustees, or the trustees or trustee for the time being, or the majority of them resident in England, to sell and absolutely dispose of and convert into money such part or parts of my personal estate and effects as shall not consist of money or securities for money, and get in, recover, and receive such part or parts of my said personal estate and effects as shall consist of money or securities for money, when and as they, my said trustees or trustee for the time being, shall in their discretion think fit, and to lay out and invest the money so to be raised and received in the public stocks or funds of Great Britain, or on government or real security, at interest, and from time to time to alter, vary, and transfer the stocks, funds, and securities in or upon which the same shall or may be laid out and invested, and again to reinvest and lay out the money arising thereby upon any new or other or like stocks, funds, or securities, as often as they, my said trustees or trustee for the time being, or a majority of them resident in England, shall, in their own absolute discretion, think fit and advisable,

and generally to act in the premises in as full and ample a manner as I could do were I living."

Now, is it possible to give the trustees a more ample power than he has given? — because he gives them every thing which they could possibly want in the exercise of their discretion, in the terms used. He concludes the whole by saying, that they are to have the same power and discretion in the premises, including of course the widow's 1500*l.*, as well as in every other part of the provision which preceded the power given in the will, which he had himself. Now, taking that clause as applicable to the whole personal estate, and as giving to the trustees the same power and discretion which he had himself over the premises, including the provision of 1500*l.* a year, coupled with the two other clauses to which I have referred, in which he clearly contemplates a possible variation of the fund to be appropriated to provide for the 1500*l.* a year, and that it may not, at some future time after his own death, be in the same state of investment as it was when it was appropriated, but might be invested in other securities, you have two clauses manifesting the notion which the testator had in his mind, of the possibility at least of that power being exercised over this particular fund, as well as over other parts of the estate. It is matter to me quite clear on this construction, that this power extended over the whole of the personal estate, and that these trustees, therefore, might decide as to the mode of investment, whether they did or did not find these funds to be appropriated. Suppose them to be appropriated, it is clear to me that he left that in the discretion of the trustees, and that having left that in the discretion of the trustees, that discretion has devolved on the court by the trustees having declined the execution of the trust. Then comes the question, What is the rule of the court, as applicable to a case of this sort, where the funds are to be appropriated out of the general estate, for the purpose of answering a particular purpose — for providing, first, for the widow for life, and then the principal being afterwards to fall into the residue? There is but one rule. The court will not exercise its discretion as to whether it will invest in one stock or another, or whether one stock is better than another. There is but one rule, and that is a rule established for the better protection of all parties interested, namely, an investment of the funds so to be invested in the 3*l.* per cents., which the testator at all events contemplated as possible, and as to which he gave the trustees a discretion, which, the trustees having declined to exercise, the court is called upon to exercise. Being of opinion that this is the clear result of the construction of the will, it is quite unnecessary to advert to many of the observations that were made in argument, showing the absurdity that would arise from a contrary construction. One observation that was made appeared to me to be quite unanswerable, although it was ingeniously attempted to be got rid of, if the construction contended for be the true construction, namely, that the trustees had no power, and the court had no power, of dealing with any portion of the estate, except that fund in the state of investment at the time of the death of the testator. Why, then, 10,000*l.* or

20,000*l.* lying at the banker's would not be capable of being appropriated as a provision for this purpose. It must be laid out, as it would not be a fund producing income; it would be a fund to produce income by an act to be done after his death, but it would not be a specific appropriation of any fund, in fact, producing income at the time of his death. But I do not advert to those consequences, because it appears to me that the court, on a matter of serious doubt, might follow each construction to its consequences, and see which is the most reasonable and most rational as a means of turning the scale, if there be a great doubt and ambiguity on what was the form of expression used. This case, in my mind, is free from doubt, and it is totally impossible to put any other construction on the will consistent with the absolute terms used in the will, but that there was a discretion in the trustees as to the fund which they were to appropriate, either by purchase, or procuring or transferring in such a way as they might think proper. That discretion has not been exercised by the trustees, and the court exercises it, therefore, in the usual course of administering property under these circumstances. Then I find it also consistent with the declaration made in the original decree, which stands unappealed from, and therefore binding on all parties. There can be no doubt as to the course which I ought to adopt, and which the vice chancellor did adopt, namely, declaring that the 1500*l.* a year ought to be provided for by an investment of so much of the personal estate as may be necessary to purchase in the 3*l.* per cents. enough to answer the purpose of producing that income. It was said there was an expression in the decree which was inconsistent with it, because it had declared "according to the true construction of the will." In one sense that would be incorrect, no doubt, because the will says nothing about 3*l.* per cents. in terms. No doubt it might have been better if it had said, "according to the true construction of the will, regard being had to the rule of this court—the rule which ought to regulate the conduct of the trustees." I do not think it is necessary to make any alteration in the decree on that point, because in one sense it is correct; the construction of the will bringing the case within the ordinary rule of this court in administering the trusts, the duty of the court arises of investing the property in the 3*l.* per cents. Although the whole does not depend on the construction of the will, it is the construction of the will which leads to the declaration of the court, namely, that the 3*l.* per cents ought to be the fund to produce the 1500*l.* a year. I do not think it is necessary to make the alteration which I believe was suggested by myself in the course of the argument, but I shall best perform my duty by affirming the decree.

The present appeal sought to reverse that decision. The printed reasons in support of the appellants' case were: First, because it is the clear and express intention of the testator that certain and specific portions, and so much only of his personal estate, should be selected, appropriated, and set apart for the benefit of his wife, as at the time of his decease was producing the clear annual income of 1500*l.* Secondly, because the direction to select, appropriate, and set

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apart so much of his personal estate as was, at the time of his decease, producing such annual income, would be defeated by a purchase of 3*l*. per cent. bank annuities. Thirdly, because the direction, that his wife shall benefit or suffer by an increase or diminution in the amount of the annual proceeds of the fund so to be appropriated and set apart, excludes the possibility of the testator having contemplated or intended that that fund should consist of 3*l*. per cent. bank annuities. Fourthly, because the respondent, Harris Prendergast, whilst he continued the sole acting executor of the will, was willing to have exercised the authority given by the testator to appropriate a sufficient part of his existing personal estate to answer the annuity to his widow, if the court was of opinion that the words of the will did clearly confer such power of selection; and the appellant C. G. Prendergast, (another executor named in the will, who had lately proved,) after he had proved the will, was also willing to exercise the power of selection and appropriation; and under such circumstances the court was neither required nor at liberty to direct a conversion of the personal estate of the testator into 3*l*. per cent. consolidated bank annuities for the purpose of securing the due payment of the annuity.

The printed reasons in support of the respondent Emma Eliza Prendergast's case were: First, because it was the testator's clearly expressed intention to give his widow an annuity of 1500*l*., and to divide the funds to be set apart for securing such annuity, upon her death or second marriage, amongst his children. Secondly, because the duty of appropriating a fund to be set apart for such purposes appears, by the answer of the sole acting executor and trustee, to have been thrown upon the court; and therefore the question which the court was called upon to decide was, not what discretionary powers (if any) were given by the testator to the trustees of his will, but how the trusts of his will ought to be carried into execution by the court itself.

The respondent Harris Prendergast printed a separate case and appendix; and for not exercising his discretionary powers he assigned the following reason: because, under the conflicting claims, disputes, and differences formerly and still made and subsisting by and between the several parties beneficially interested in the testator's residuary estate, this respondent became and is now exonerated and protected by the said decrees from exercising, and that he ought not to be called upon to exercise or join in exercising, any discretion touching the appropriation of the said residuary estate, or any part thereof.

Bethell and Hetherington, in support of the appeal, cited *Pickering v. Pickering*, 4 My. & C. 289; 3 Jur. 743. *Howe v. Lord Dartmouth*, 7 Ves. 137. *Lord v. Godfrey*, 4 Mad. 455. *Hewett v. Hewett*, 2 Eden, 332. *Gower v. Mainwaring*, 2 Ves. sen. 87.

The Attorney General and Tenant, for the chief respondents, cited *Fordyce v. Bridges*, 2 Ph. 497; 10 Jur. 1020. *Penny v. Turner*, Id. 493; 10 Jur. 768. *Cole v. Wade*, 16 Ves. 27.

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R. Palmer and *C. M. Roupell*, for the respondent *Harris Prendergast*, stated that they appeared for his protection, the appellants having stated on their case that he was willing to exercise his discretion.

Bethell replied.

August 9, 1850. LORD BROUGHAM. My lords, the question here arising is of importance, from accidental circumstances, to the parties, and it is also important to the law, as administered in courts of equity. As I entertain no doubt upon it, I shall not delay longer to dispose of the case, and put an end to a somewhat protracted family suit. First of all, let me state the principle which the concurrent authorities of the cases and the known course of proceedings in our courts of equity have established. If a person leaves the disposition of his property after his decease to trustees, and, they declining to act or neglecting to act, the aid of the court is required, the court will not, as a matter of course, exercise the discretion with which the trustees were invested, but will follow its own established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding. But the court will no doubt earnestly and anxiously look to the will of the testator, and so deal with the property as to effectuate the purpose that he appears to have had in view. Thus, if a gift be to one for life, with remainder to others, the court, considering that there is a clear intention of giving to the remainder-man that which the first taker was to have for his life, will prevent perishable and temporary interests from being wholly enjoyed by the tenant for life, and the remainder-man disappointed, or will prevent an undue proportion from falling to the remainder-man, and a partial disappointment of the latter. This just purpose can only be effected by a conversion, in some cases, of the perishable property, and giving the party entitled for life only the enjoyment of the fruits of that into which the *corpus* has been converted. Thus, terminable annuities and leaseholds will be sold, and the price invested, for the benefit, first, of the taker for life; next, for that of the party or parties in remainder. But as this proceeds wholly upon a regard for the testator's manifest intention, a like regard must be paid to whatever indicates a design on his part, that, notwithstanding the form of the gift, the first taker should enjoy the subject matter in specie, and thus possibly defeat the subsequent gift in part or even in whole; for *cujus est dare ejus est disponere*. The court, therefore, attentively and anxiously looks to all indications of such an intention, and, before it orders a conversion, must be satisfied that such a course is not excluded by the whole instrument taken together. It is perhaps hardly necessary to cite authorities in support of principles so plain, for they merely consist in this almost self-evident proposition, that the intention of the testator is to guide the court, which assumes the execution of his will. But illustrations of the manner in which the court has acted in working out the guiding principle may be obtained from some well-known cases. Thus, in *Collins v. Collins*, 2 My. & K. 703, decided at the rolls, there was a devise of all property of all kinds, without any

reserve, to A., and at her death to be divided, and one half was to be at her disposal, that is, one moiety of what the property should be when divided at her death. The master of the rolls held, that the leasehold could not be sold, the intention plainly appearing that A. should enjoy it for her life. *Alcock v. Soper*, 2 My. & K. 699, was a like case, where the intention that the property should not be converted was held to arise from a direction to sell freehold and also leasehold after the death of the first taker, and that the dividend of annuities was expressly given. His honor, therefore, gave the income of annuities, and would not order them to be sold. In *Pickering v. Pickering*, *ubi sup.*, the gift was of "all the rents, interest, dividends, annual produce and profits, and of the use and enjoyment of all the estate and effects whatever, real and personal," (certainly very large words to express every enjoyment;) and there was a further material direction or gift "of the absolute use, not for *life*, but the absolute use of the furniture, wine, coal, linen, china." The question arose on converting a leasehold house by a sale of the term; and the court held this to be excluded by the clear indication of the testator's intention in the very general and exhausting phrase of the gift, and in the further gift of the furniture in the house. I can see nothing in *Hove v. Dartmouth*, *ubi sup.*, which breaks in upon the doctrine held in these cases. On the contrary, taking the whole facts in that case and all Lord Eldon's observations together, I think they confirm the views entertained in the latter decision. My lords, we are now to apply these principles to the case at the bar. And, first, I hold it to be clear that the will invests the trustees with a discretion. They are to select and appropriate as much of the personalty as, at the testator's death, shall produce 1500*l.* He gives them this amount, and desires them to select and to appropriate it from his whole personalty. He does not say that they are to select that which at the time shall be producing 1500*l.*, but they are to select so much as shall produce, that is, when invested shall produce, 1500*l.*; and they are to hold this—for what purpose? To pay the annual produce to his widow by half-yearly payments, beginning six months after his death. This direction, of itself, clearly shows that the trustees were not to keep the *corpus* in specie, for of the ten or more kinds of securities of which the testator was possessed at the date of the will, and at his death also, some were such as paid at one period of the year, some at another, and some perhaps, at no period of the year, or of any year.

Again, he directs the fund to be distributed at his widow's death or second marriage thus: "the personal estate so appropriated, or the stocks, funds, or securities in or upon which the same shall then be laid out or invested." This most clearly implies that the conversion of the personalty by sale and reinvestment was in the testator's contemplation; the conversion of that very portion which the trustees should have selected, and not a conversion at the date of distribution; for it is the securities on which the same shall then be laid out, that is, at the widow's decease or second marriage. Therefore it must have been converted before either of those events, in order to make the word "then" applicable. Again, he directs any rise or fall in the

annual produce to be the gain or the loss of the widow — a further indication that he contemplated, perhaps, even a speculative use of his funds by his trustees. There are other parts of the will to the like effect. "And I hereby direct that it shall and may be lawful for, and I authorize and empower, my said trustees, or the majority of them, at their own discretion, to permit the whole or any part of my personal estate to remain and continue on such securities as the same may happen to be invested upon at the time of my decease, so long as they shall see fit, without being in any way answerable or responsible for so doing. Nevertheless, I do hereby fully authorize and empower my said trustees, &c., to sell and absolutely dispose of or convert into money such part or parts of my personal estate and effects as shall not consist of money or securities for money, and call in, recover, and receive such as shall consist of money or securities for money, and to lay out and invest the money so to be raised and received in the public funds, or on government or real securities, at interest, and from time to time to alter, vary, and transpose the stocks, funds, and securities in or upon which the same shall or may be laid out and invested, and again to reinvest and lay out the money arising thereby upon any new or other or the like stocks, funds, or securities, as often as they shall, in their own absolute discretion, think fit and advisable, and generally to act in the premises in as full and ample a manner as I could do were I living." I take it, then, to be quite clear, that the discretion was vested in the trustees, and that they declined to exercise that discretion. It avails nothing to say that Mr. Harris Prendergast offers to act, if the court shall protect, order, and indemnify him. His answer states his refusal; and the court, on this, is applied to for its assistance. Now, my lords, how is the court to act? The widow is to be provided for for life, or during her viduity, and the fund appropriated out of the general estate is then to sink into the residue. The court can do nothing which is expressly or by plain implication directed by the testator to be done. It was so said by the lord chancellor in *Penny v. Turner*, (*ubi sup.*;) and herein he only followed the constant current of decided cases: *Brown v. Higgs*, 4 Ves. 707; 5 Ves. 495. *Longmore v. Broom*, 7 Ves. 124. *Burrough v. Philcox*, 5 My. & C. 92. "The mother had power to distribute the property, as she thought best, between the three sisters and their children. She certainly might have given some to each; they, therefore, constituted the favored class. Nothing was lost by the failure of the appointment but the distribution or selection amongst this class; that having failed, the court cannot supply execution of the power, but to effect the general intent gives the property to the whole class equally." Here the court can exercise no discretion as to the investment of the property in one stock rather than in another. The rule of the court is to invest in the 3½ per cents. I agree with Lord Cottenham in holding, that the testator, at all events, contemplated this as possible; indeed, the rule of the court so established must be regarded as known to all, and all must be understood to be aware, that if trustees, whom they appoint, shall decline to act, the court acting will follow its known rule. In this case the testator gave the trustees a discretion which they

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declined to exercise; and it devolves on the court, which has no choice as to the mode and manner of exercising it. If, indeed, there had been found in the will any indication of an intention on the testator's part, testified either by express words, or to be gathered as implied, that any one fund should be preferred, or that any stock should remain in specie and unconverted, or that any fund should be excluded, or that any other mode of dealing with the property should be pursued, or any mode excluded, then, of course, the case would have fallen within the scope of those principles which I stated in the outset, and would have come within the application of the cases to which, in order to give an illustration of the general principle, I referred. But I can descry no such intention in this will, either expressed or implied. On the contrary, the testator clearly contemplated a possible, perhaps a probable, conversion, and in that he did not fetter the trustees, nor is the court bound. I advise your lordships, therefore, that the judgment appealed from should be affirmed; and Mr. Harris Prendergast, who ought not to have printed any case, though he might attend by counsel, is not entitled to have, out of the residue, any costs of the unnecessary part of his case; his other costs he is entitled to have with the rest.

Appeal dismissed. Costs to come out of the estate.

ELIZABETH IRVINE, or DOUGLAS, & others, Appellants; KIRKPATRICK, Respondent.¹

July and August 1 and 2, 1850.

Fraud — Pleading — Setting aside Deeds for Misrepresentation and Concealment.

Deeds will not be set aside after thirty-seven and thirty-nine years from their dates, on the grounds of misrepresentation and concealment, unless the averments in the pleadings and proof of fraudulent representation and concealment are precise in their character.

Although length of time be no bar to fraud, yet it is a circumstance to be taken into consideration by the court in forming its judgment; and this is consonant both to the law of England and Scotland.

Semble, that where a party communicates the effect of one of two opinions given by separate counsel, withholding the one which is opposed to his own interest in the subject matter of the case, it is both misrepresentation and concealment.

A conjectural estimate of what may be the value of an estate is not a misrepresentation.

Concealment, to be fraudulent and material, must be a concealment of something that the party concealing was bound to disclose.

The reasons and arguments of a peer on advising the house to a particular judgment to be given, may be continued from one day to another.

This appeal was against several interlocutors of the Lord Ordinary and first division of the Court of Session in Scotland; by one of which

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the court had reduced, or set aside, two several deeds of assignation, executed so far back as the years 1798 and 1800, in favor of the late Walter Irvine, Esq., the one thereof by his sister, Mrs. Ann Burn, and her husband, and the other by three other sisters, viz., Miss Irvine, Mrs. Wardrobe, and Mrs. Kirkpatrick. No objection had ever been taken, by any of the parties, to the deeds, although they lived for many years after the deeds were executed. But the respondent alleging himself to be the representative of Mrs. Burn, Miss Irvine, and Mrs. Kirkpatrick, long after their deaths, and after the death of Mrs. Wardrobe, the other sister, and of Mr. Walter Irvine himself, in whose favor the deeds were granted, and also long after all persons who could have given evidence as to the transaction were dead, proceeded to bring his action in the Court of Session, in the month of October, 1837, just then forty years—the period when the long prescription of the law of Scotland was on the point of expiring.

The case was argued at great length by

Sir Fitzroy Kelly and Anderson, for the appellants.

The Lord Advocate, James Parker, and Rolt, for the respondents.

[The length of the judgment precludes any note of the arguments being given; but the facts of the case, and the general effect of the arguments, are so fully stated in the most elaborate speech of Lord Brougham, in moving the reversal of the orders of the courts below, setting aside the deeds, that it is the less necessary to give them in detail.]

LORD BROUGHAM. This case, my lords, brings before your lordships for decision the merits of an interlocutor of the Court of Session in Scotland, reducing two deeds of assignment, or, as it is called in Scotland, “assignation,” one made in 1798, and the other in 1800, between two parties, one of whom is Walter Irvine, the father of the present appellant, Lady William Douglas, and the others of whom are the four sisters of Walter Irvine,—Mrs. Burn, Miss Irvine, Mrs. Wardrobe, and Mrs. Kirkpatrick, formerly the Misses Irvine,—and their representatives.

And it is painful in the very outset of the remarks which I am about to submit to your lordships to observe, that we are here deciding upon the validity of two deeds, made by and in favor of parties none of whom are here present, their interests being only represented by their heirs and representatives, for the parties themselves have long since gone to their graves. The last of them died in 1829, others of them in 1824, 1825, or 1826, I think; and the first observation which I have to make to your lordships will rest upon that circumstance. My lords, the deeds were sought to be reduced by proceedings commenced at periods of thirty-seven years and thirty-nine years respectively from the dates of those instruments brought under reduction. Those two instruments or assignations consisted of a family arrange-

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ment, upon which I shall say a word presently, between Walter Irvine, the brother, he and Christopher being the survivors of three brothers, Charles being dead, and his four sisters, (three of whom were then the unmarried sisters, the Misses Irvine,) of whom Mrs. Burn was one, Miss Irvine another, Mrs. Wardrobe the third, and Mrs. Kirkpatrick the fourth. My lords, a large estate in Tobago had belonged to one of the brothers, Charles Irvine, who died long before the commencement of the suit, a considerable time before the execution of the second, and a little while before the execution of the first of these deeds. He died in 1798; and questions of a complicated nature arose immediately after the death of Charles Irvine respecting the succession to his property, for there were mortgages upon it to a considerable amount, with other claims. There was a lunatic, a Miss Leith, who had interests, or a claim, as it is called, on the estate, and there was Walter Irvine, the heir at law to the real estate, and who, by the law of Tobago, if Charles was understood to be there domiciled, had a claim also to a share of the personalty. There was, likewise, Christopher, who had a claim, past all doubt, to his share, being the agent of the estate, living in the island, and, I believe, domiciled there, though that is immaterial. Charles Irvine, the deceased, to whom Walter succeeded as heir at law, was domiciled, as it appears, though that is not admitted, but he rather appears to have been for six years, namely, from 1792 to 1798, resident in Scotland, being a native of that country, whither he had returned from Tobago, and where, without ever returning to Tobago, he died.

At the late period to which I have alluded, namely, thirty-seven years after the last of the deeds, and thirty-nine years after the first had been executed, proceedings were commenced in the court in Scotland, out of which the judgment arose which is the subject of the present consideration. Proceedings were commenced by an action of reduction of these two deeds, upon the ground of misrepresentation by Walter to his sisters, the Misses Irvine, or of fraudulent concealment of facts within his knowledge from their knowledge, or both fraudulent misrepresentation and fraudulent concealment, which, past all doubt, if sufficiently averred on the pleadings, and if sufficiently proved in evidence, would have been enough to have called upon the court to reduce or set aside the deeds. The object of this arrangement was, on the part of Walter, to obtain from his sisters the surrender of their right to their share of the personalty of Charles, their deceased brother, and the question, and the only question, is, as I have stated, whether in order to obtain this benefit for himself he fraudulently misrepresented or fraudulently concealed matters, to induce his sisters to enter into that arrangement, and whether such misrepresentation or concealment, or both, operated upon them, and gave rise to their executing the two deeds in question. And here I must stop to remove out of the cause that which has not been dwelt upon except as a topic in argument occasionally, but which I consider, in the circumstances of the case, to have little or no place, namely, that this is in the nature of a family arrangement, — for I conceive that a family arrangement between parties who were treating really at arms' length as these

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were, who were not upon good terms, at least two of the sisters were not upon good terms with their brother Walter, has little or no place, and above all, where fraud is alleged. That, therefore, I remove out of the cause.

But, my lords, I now come to a consideration of the manner in which the court dealt with the case upon the pleadings. It appeared to their lordships, after argument, that there was sufficient ground for directing an issue and sending it to be tried by a jury, and from that decision, or from the decision and the shape of the verdict, no appeal lies any more than the motion for a new trial which was subsequently made and refused, therefore we have nothing judicially to do with that. Nevertheless it is difficult for me in considering this case, and casting my eye back upon the course of the discussion on either side at the bar, it is difficult for me so regarding what has passed, and regarding the evidence, the mass of which I now have under my hand, to avoid expressing one word of regret that such a course was taken; for here are between nine and ten hundred closely printed quarto pages of correspondence submitted to a jury, who through that maze were to find their way, who by examining the pieces whereof that mass consisted were to make up their minds, and who, as the result of that painful and hardly practicable examination, that laborious and hardly possible inquiry, were to give their opinion upon the matter of fact submitted to their consideration by the issues sent to them to try. I had much rather that the opinion of the court itself had been taken upon the subject than that it should have been sent to be tried by a jury. It is now too late to wish for that which did not take place. That which we are now dealing with, is not how the court thought fit to deal with the case first at the trial, and next on motion for a new trial, as with neither the trial nor the motion for a new trial have your lordships any thing to do, but the judgment which they finally pronounced setting the deeds aside,—and first, having a word to say with respect to the time which has elapsed; I know not, however, that it may not be more convenient that I should commence with what I have to offer upon the frame of the issues, and upon the forms of the pleadings. There were two deeds numbered 54 and 55 in the process, or, as I see, they are called Nos. 57 and 58 in my copy of the pleadings. I know not why, but in this they are called 54 and 55, being Mrs. Burn's deed, and Miss Irvine's, Mrs. Wardrobe's, and Mrs. Kirkpatrick's deed respectively. These deeds were the subject matter of the two issues, and the issues are conceived in the same terms, the material thing to consider being whether Walter Irvine did obtain (it is not even said "did or did not," so as to make it grammatical) the deeds in question, Nos. 54 and 55, by fraudulent misrepresentation, or fraudulent concealment, from his sisters. Beyond all manner of doubt this is an improper form of issue. It is improper for more reasons than one, each of which would be enough to support its condemnation. It is improper to couple together two not necessarily connected or even dependent issues. It is highly improper, illogical, and in every respect mischievous to put a question on two separate matters, to one of which an affirmative

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answer might be returned, and to the other a negative. It is asking a jury to answer a double question, to one parcel of which they might say "yea," and to another, "nay," contrary to every rule either of examining a witness or of interrogating a jury. But it is improper on another account, and most essentially and for paramount reason improper, when you consider that you are not asking the question, as in the case of a witness of one individual, but of twelve, six of whom might say that the deed was obtained by fraudulent misrepresentation, and the other six that it was obtained by fraudulent concealment. They altogether, the whole twelve, might join in giving that verdict which alone they gave, making no distinction, effecting no separation, referring to no diversity between the two matters, but a general verdict for the pursuer—meaning against the deed—not even answering the question put, not even saying that it was fraudulently obtained, and without saying in what way, but a general verdict for the pursuer, leaving the court to gather, and I believe this is not inconsistent with the loose and slovenly practice of that court, that it was meant to answer the question put to the jury in the affirmative generally. How, then, can we say that we have a verdict at all upon such an issue sent to a jury, and such a general verdict returned? I have no security. I cannot tell; I do not mean to say that the fault of the issue might not have been cured by the verdict of the jury. I do not mean to say that if the jury had returned a verdict in answer to these two questions they might not have got rid of the evil of the duplicity of these two questions, for they might have said if they had chosen, "we specially find" so and so; then it must have been unanimous, and that would have taken away all risk of there being no verdict at all, which exists in the present case. They might have said, "We find that there was fraudulent misrepresentation, and that the deed was obtained by that, but we do not find that there was fraudulent concealment;" or they might have said, "There was fraudulent concealment, but we do not say there was fraudulent misrepresentation;" or they might have said, "There was both fraudulent misrepresentation and fraudulent concealment," or they might have said there was neither. Therefore they might, by a special finding, have cured the radical defect of the question put to them; and why, let me ask, did the most able and learned judge who tried the cause not give his direction to the jury so to find? If he had done so, I am far from meaning to say that he would have taken away all difficulty in the present case, but at least he would have taken away from the court below, and from your lordships' dealing with what was done in the court below, the first of the great difficulties which meets us and obstructs our progress in endeavoring to see our way through this case. He did not so think fit to do, and a general verdict was thus returned. A motion for a new trial was made; it was refused, and that could not be appealed from. Judgment was then passed for the pursuer according to the verdict, as the court deemed it and construed it; that judgment was to reduce the deeds, and that is the judgment and decree now under appeal.

My lords, the next observation which I have to make is perhaps

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still more material with a view to the ultimate decision of the cause. The verdict being general, not finding whether it was misrepresentation or concealment, or both, but only negating that it was neither, (it was for one or other of those reasons, or both, I cannot tell which, and cannot pretend to say which, that the jury found for the pursuer,) what position do we now find ourselves in? And what position were the court in, though they do not seem to have been aware of it? Notwithstanding the trial ordered, notwithstanding the trial had, notwithstanding the verdict pronounced, and notwithstanding the refusal to have a new investigation, no valid judgment could pass upon this record unless there was in the record enough to support the judgment. The verdict is only ancillary to the working out, as it were, of the purpose of the record. Then we are referred to the summons and condescendence, and whatever else on the part of the pursuer is said to be his recorded statement of his own case. Well, but suppose this, which is possible, which might have happened in this case, and may happen in any other case of the same sort in which this double mode of framing issues is adopted, suppose one of the two matters were well and validly alleged upon the record, so that, if the finding had been upon that, there would have been no doubt that judgment would have passed upon it. Suppose the other matter were so set forth upon the record, that if a verdict had passed upon it, no judgment could validly have been supported by that finding: here is the position we are in. I will suppose misrepresentation to have been duly alleged with sufficient specification. I will suppose concealment to have been not duly alleged with sufficient specification, or, which comes to the same thing, that it was concealment of that which the party had no obligation of any sort, either in law or equity, to reveal, and suppose the jury had found upon the misrepresentation in the affirmative, judgment, beyond all doubt, would have passed upon that finding. But then suppose they had found only upon the record, which was invalidly set forth, it is equally clear that no judgment could have passed validly upon it. Well, then, where are we? We have a verdict, and we cannot say whether it was upon the misrepresentation, which verdict, if it had been upon that, would have supported the judgment; or whether it was for concealment, which, by the case I am putting, the hypothesis I am making, would not have supported the judgment. Then how is the court validly or safely to pronounce a judgment? It is contended by the appellants that in that case the only judgment fit to be pronounced would be of an *absolutur* to assail the defenders, called into court upon such a record, and charged only upon such a verdict from the conclusions of the summons. I have considered this point with great attention, and I have been referred to a great number of cases to show that this is the common mode of pleading in Scotland. But upon looking into those cases, which I have attentively considered, one difficulty occurred to me in all of them. For aught I know, the difficulty was cured in the mode which I have described as that which might have been adopted here, namely, by finding specially; I cannot tell, and I have asked in vain for a copy of any book in

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which any of those cases could be traced. Mr. Lefevre was kind enough to look this morning, at my desire, after I had read the cases yesterday morning, and he can find no book whatever in which we see the result of such trials.

At all events, those cases (putting that circumstance entirely aside) were given to me with another view, not with a view to the ultimate effect of those cases, but with a view to show that here the ordinary course of pleading had been pursued, and that it is the ordinary course of pleading I think is sufficiently proved. I think it is *mala praxis*. I hope and trust that it is a *mala praxis* which will be no longer followed, and I take leave most respectfully, but most earnestly, to press upon the attention of their lordships in the court below the propriety of turning over a new leaf, and adopting a new and a more sensible, and rational, and logical practice. I should have been in very great difficulty indeed upon this subject, if I had been of opinion that misrepresentation was validly set forth, and concealment not competently set forth, or that misrepresentation was incompetently set forth, and that concealment was validly set forth. I should have been, upon the shape of this record, and its posture, in a most painful predicament. I should then have had to go into the learning of those cases which were so much discussed here some six years ago; I mean in Mr. O'Connell's case, in the case of the writ of error, in which your lordships decided contrary to my opinion, contrary to the opinion of the great majority of the judges, contrary to the opinion of my noble and learned friend Lord Lyndhurst, with whom, by the way, I have consulted and considered those points in the present case, and who entirely agrees with me in opinion upon them. We were clearly of opinion that that case was wrongly decided; but we bowed, as we were bound to do, to the majority of your lordships, who decided in favor of the writ of error of the plaintiff in error, and that decision was only disputed by me on the ground of precedent and practice. Your lordships, admitting the precedent and practice, held it to be *mala praxis*, and that it was fit to be reformed. But the rule to be collected in that case is that in criminal cases, contrary to the opinion of Lord Mansfield, *obiter*, more or less certainly, but a *dictum* deserving of the greatest consideration, and entitled to the most profound respect, *still only a dictum*, not a decision of his lordship, that the rule is the same in criminal as in civil cases; I never doubted, Lord Lyndhurst never doubted, the majority of the judges never doubted, that it was so in a civil suit. If there are several counts, one of which is bad, and the others are good, and there is a general finding for the plaintiff upon the whole, you cannot apportion the damages between the two; you cannot say how much is meant to apply to the good and how much to the bad; and therefore the whole is bad, and there is judgment *non obstante veredicto*. But now that is the rule applied to criminal cases as well as civil. The rule, therefore, is general that there can be no judgment upon a verdict so taken, either in a civil case or in a criminal case, for the reason which applies to this case. I have said that it gives me great satisfaction, after the most anxious attention which I have given to

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this cause, and to all the particulars of it, which I shall now shortly go into, that I am not reduced to the necessity of deciding upon that ground, which might probably be enough to support the judgment of reversal which I am about to move your lordships to pronounce; but there are, in my opinion, other grounds on which that judgment will be supported; and, first, my lords, I will again advert to the time which has here elapsed. Thirty-seven years after the one deed was made, and thirty-nine years after the other, an impeachment by this action upon the allegation of fraud is brought against those instruments, and that fraud is imputed to a gentleman hitherto always supposed, as is said, (but it is immaterial, I must assume it to be so,) to be of fair and respectable character, and his nearest relations are now to defend his memory, and defend their own rights against that foul imputation of fraud of the worst description, for it was taking an unfair and fraudulent advantage of his nearest relations, whom he was rather bound in honor to protect than entitled to deceive. My lords, no time will run as a common-law limitation against fraud; that must be on all hands admitted. No time, say the Scotch lawyers, can be taken as a bar to an action of reduction like this, unless time and acquiescence be specially pleaded. A party meaning, say they, to avail himself of the topic of time, must do it by a plea, and must either succeed altogether, or, I suppose they mean to add, fail altogether. I cannot go so far as that; I too say, that no time will run to protect and screen fraud. I too say, that a court of equity will overleap the barrier of time to get at the fraudulent parties and their deeds, and to undo those deeds, and to prevent any one, whether accomplice or innocent, from profiting by the fruits of fraud. I too say, therefore, that the length of time which has elapsed is not a bar to this suit. But that it should not enter into our consideration; that it is to be wholly dismissed; that, as a suggestion, it is to have no effect upon us in moulding, as it were, in influencing the frame of mind in which we shall be when we are to consider the rest of the case, either as a jury upon the facts, or as judges upon the law; to that proposition I cannot assent. The parties are all dead long and long ago. The party accused, Walter Irvine, died nine years before the action was commenced; of the other parties who survived, the latest died four years before the action was commenced, and all their agents and men of business are in their graves. Every one who, by parol testimony, could have shed any light upon this transaction, has gone. The action is brought thirty-seven and thirty-nine years after the fraud is alleged to have been committed, and forty-six and forty-eight years after that fraud is alleged to have been committed the first trial by a jury takes place, and the matter of fact of the fraud is to be submitted to that jury. Am I not to take into account this grievous injury to the party charged? I do not mean to the memory of Walter Irvine, and the feelings of his surviving family, but to the parties charged, and sought to be ousted of their property under those deeds. Am I to dismiss that entirely from my consideration, and to deal dryly with all the facts and all the law of this case exactly as if it had happened three or four years before

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the action was brought, or perhaps as many months? I cannot go that length; on the contrary, I hold that it is most material—and I fearlessly lay down this to be the law of Scotland, as well as of England—that in such circumstances of lying by, if there be no explanation, if there be no satisfactory account of it, and that the party here and his advisers are well aware of that topic is clear, for they, in their summons, set forth a reason to excuse it, which is no reason at all, that, until the chancery suit was decided, which I did not dispose of finally till 1833, they could not bring the action. Why could not they? They did not choose, because they did not know exactly whether it would be worth their while; but that is not a reason to excuse the delay; it is not even a topic of argument. I say I lay down this fearlessly as the law of this country and of Scotland, and of every country having an enlightened and rational, and I may say a civilized, system of jurisprudence, that in such a case as this the party must be held to the very stinted proof in regard to the facts; but that is not all, but that also in regard to the pleading, to the shaping of the action, which is his own choice, though he cannot choose the facts, he shall be held most rigorously to the principles of strict logical pleading. It is a case in which I would hold him as tight as if it were a question of an indictment for perjury, and assignments of perjury were required that A. B. did falsely swear, whereas, in truth and in fact, so and so. It is a case in which, as Lord Mansfield once said when similarly circumstanced, though not in respect of time or of fraud, “I would hold the party to the ticking of a *t* and the dotting of an *i* in his pleadings.” Unfortunately, my lords, this does not appear to have been the view taken of it by the learned judges in the court below. The lord president, who entirely disapproved of the verdict, and who alone of the four judges pronounced a very positive, clear, and unhesitating opinion one way, relies very much and largely upon the point of time. Lord Mackenzie alone of the other three makes any allusion to it, and he says, “Delay is less material in this cause, because the evidence is documentary, and *littera scripta manet*, and therefore this objection is of no great force.”

It might have occurred to his lordship, as it does to me, that it might have been not wholly documentary, if the action had been brought three or four years after the alleged fraud was committed. Lord Fullerton says nothing of time at all, though the lord president seems to have thought it to be entirely decisive; at least the lord president says it is such that it would be nothing but a severe criminal infliction, and it is a point which Lord Mackenzie himself thinks it right to deal with. This is what they say upon the time, then; upon the case itself, Lord Jeffreys says there is a great hardship. But of what kind? On account of the magnitude of the sums and the reputation and character involved? But he does not make the least mention of the greatest hardship of all, namely, the lapse of seven or eight and thirty years. These learned judges, I must say, though it is not now material, it is comfortable to think of it in the conclusion at which I have arrived, and to which I wish your lordships to come, — one of them, Lord Mackenzie, says, “Looking at it

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altogether, I cannot say the verdict is grossly wrong; I do not say if I had been on the jury I would have given the same verdict, but I cannot say they are grossly wrong." He adds, Lord Fullerton says, "There is no doubt that the case in evidence is much weaker than the case averred upon the record, and he goes chiefly on the concealment, making little reference to the other point." Lord Jeffrey says, "On all grounds there is great room for diversity of opinion. The court might differ from the jury, but that is not enough."

Then he sums up: "I rather think that the impression on my mind is, that the arrangements were not fairly obtained." These things go entirely to the merits of the case. In point of fact we are only upon the record; at the same time I feel great comfort and satisfaction in looking over the mass of evidence, and looking at these opinions of the judges in feeling perfectly clear, that if I had been in the court below I should have agreed with the clear opinion of the learned lord president, differing, I will not say from the very clear opinion, but from the very hesitating and hardly perfectly formed opinion of the other three judges, who dissent, and only dissent so far, without pledging themselves to any difference upon the merits, as to say that they do not think the jury were so clearly what they call grossly wrong as would justify sending it again for trial.

We now therefore come, my lords, to the record, upon which every thing turns, and as your lordships sit upon some very important business at five o'clock, and I shall not be able by that time to finish what I have to add to my statement, which I thought it very material to make fully upon the law of the case before proceeding to what must be the ground of the motion with which I am about to conclude for a reversal, I think that the more convenient course would be that I should finish any observations to-morrow rather than to-day. Therefore, if it is your lordships' pleasure, we will conclude the consideration of this case to-morrow; the case is one of great anxiety, and it is very fitting, therefore, that I should state the conclusion at which I have arrived. If I should not to-morrow be able to move the judgment, I have, in case of accident, announced the conclusion to which I have come, as I did in that very case of *Leith v. Irvine*, the inquiry having lasted twenty-five days before me. I would not expose the parties to the expense and delay of a rehearing when it had arrived at the last stage. I shall, therefore, conclude my observations to-morrow, either at the sitting of the court or at the close of the court, whichever is most convenient to the parties, taking a course of which we have many examples, Lord Eldon in the *Roxburgh* case and others. Lord Eldon has repeatedly broken off in the middle of a judgment.

Further consideration postponed.

Friday, August 2, 1850. LORD BROUGHAM. I had yesterday gone through the two important points of the lapse of time, and the state of the pleadings, and it remains for me to apply the principle which I then laid down to this particular case, and to this particular record. When I stated my opinion with respect to the record, the double question involved in the issue, and the single finding for the pursuer

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upon the whole matter, I might have illustrated it, as one or two special pleaders with whom I have had communication upon the subject have illustrated it, by applying to it the rules of pleading here. Suppose an action is brought upon a bond, and the defendant, in order to escape from the obligation of his bond, specially pleads this, that it was obtained from him by the obligee, the plaintiff, by means of fraudulent misrepresentation or fraudulent concealment. Suppose fraudulent misrepresentation is the ground of one special plea, and fraudulent concealment of another; and suppose the fraudulent misrepresentation is stated validly and unobjectionably,—fraudulent misrepresentation inasmuch as so and so was said or represented by the obligee contrary to the truth, and contrary to his knowledge of what the truth was,—if the verdict were upon that count, no question it would stand for the defendant. But suppose there were another count setting forth, as an excuse for the non-payment, fraudulent concealment, inasmuch as so and so, and then something were set forth which amounted to no fraudulent concealment, either because there was no duty to disclose it, or because the statement was *felo de se*, and showed in itself that there was no fraudulent concealment,—past all doubt, no verdict could stand on that count. Then, suppose a verdict were given upon both counts, without distinction, and the judgment were entered up upon that verdict generally, without distinguishing on which of the two, or whether upon both, only negating that it was upon neither, that would be this case.

Well, then, past all doubt, upon a writ of error that could not stand. Then the question would be, whether to give judgment for the plaintiff in consequence of the badness of the verdict and the judgment, or to award a repleader, or to award a *venire de novo*. A repleader could not be awarded, because it would be in favor of the party who had made the first fault in the pleading, and it would be contrary to all rules of pleading to award a repleader. A repleader is excluded. *Venire de novo* could not be awarded, because it must be upon the same record and the same issue, and *non constat* that the jury would not return the same verdict, for you have no means of compelling the jury to separate the one from the other of the issues, and to return a special verdict. Consequently there must be in that case judgment for the plaintiff, that is to say, judgment against the plea—that is to say, judgment against the defence, resting upon the ground of fraudulent misrepresentation or fraudulent concealment. Now that is just the case here, except that here it is the defendant, there it is the plaintiff; because here it is the defendant who is claiming the benefit of that rule, there it would be the plaintiff claiming the benefit of that rule as against the plea in justification of non-payment.

However, I have stated already that it is most satisfactory to me not to find that it is necessary to decide the cause upon that point also. I have stated enough with respect to the time. I have stated the principle to be, of which there is no question, that the mere lapse of time is no bar in case of fraud. That time, for aught I know,

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may, according to the Scotch rules, have been necessary to be pleaded, and it is not pleaded. That is in the nature of a plea of acquiescence, or homologation, as it is called, with acquiescence, that is not pleaded. But although no bar, either here or in Scotland, although it may by the Scotch rules be necessary for the party to plead it in order to avail himself of it as an answer to the action, it is still most material, not only for the jury, and, upon the new trial, for the judges, with which we have nothing to do, upon the question of fact, but it is most material upon the question of pleading also; and, as Lord Mansfield said, in the case that I referred to yesterday, using the expression, it is a case in which, upon the record, I would hold the party to the ticking of a *t* or the dotting of an *i*. With these views let us now look at this cause, and I must say that it does not, upon the best consideration which I have been able to give to it, appear to me to be at all necessary to hold the party to that rigorous closeness; it does not appear to me to be at all necessary, in order to support the judgment which I am about to move your lordships to pronounce, to appeal to the length of time which has elapsed, the decease of all the parties, the decease of all their agents, and of all persons connected with it, for even that *de recenti*, this record would not have been sufficient, according to any closeness and strictness of procedure to which the party might have been held.

What I have to state resolves itself into five heads: first, the general allegations contained in the fifth, sixth, and seventh articles of the condescendence, but into which I need not enter so much at large, because I shall afterwards have to deal with the same subject matter under the other heads; secondly, with respect to the mortgage debt on this estate; thirdly, with respect to the misrepresentation, — and hitherto I am upon fraudulent misrepresentation, — the charge that Walter Irvine represented himself as having given 1200*l.* to Christopher, whereas he gave also a bond releasing a debt; fourthly, the correspondence which took place with one of his sisters with respect to the opinion of Sir Arthur Pigot (then Mr. Pigot) and of Mr. Brown, an attorney, also stated as a misrepresentation, partly a misrepresentation and partly a concealment — a concealment of the 27th of April, when he wrote after having had Mr. Pigot's opinion, which differed from Mr. Brown's, and he gave Mr. Brown's and not Mr. Pigot's — a misrepresentation, therefore, but a concealment, in as far as having set Mr. Brown right upon the point of there being sisters as well as brothers, he did not, when he had set him right, communicate that fact. Also the concealment that took place with respect to the transaction between Christopher and himself. That transaction gives rise to the two statements — first, the allegation of misrepresentation, as if he had said he had given 1200*l.*, whereas he gave 1200*l. plus* the release of the debt due; and, secondly, the concealment of what he actually did give to Christopher for his share of the personalty. Lastly, in the fifth place, we come to the deed of assignation to Mrs. Burn, which stands upon a separate ground. When I have gone through those different heads, I shall have exhausted the case.

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Now, with respect to the statements in the fifth, sixth, and seventh articles of the condescendence, if you take the memorial which is given in page 41 of the appellant's case, it is found that the statement in article 5 of the condescendence is not contrary to the fact, when coupled with what the memorial discloses, which is to be taken as a communication made by Walter Irvine, and not only as a communication in point of fact made, but as a communication set forth upon the pleadings to have been made, and forming part and parcel, therefore, of the alleged misrepresentation. Then comes the condescendence article 6, wherein it is said that Walter Irvine stated himself on oath in the Court of Chancery in a proceeding in chancery, the mortgage debt, as in 1797, amounting to 30,000*l.* or thereby, and that by the final report by the master of chancery, it was subsequently ascertained "that it was 22,000*l.* with interest on 20,000*l.*" Now, I shall afterwards have occasion to refer to the memorial in page 42 of this case, which is part of the statement for the pursuer and against the defender; I shall have to deal with it separately immediately, therefore I need not enter further into it now than to state, upon the whole, these two articles, (the fifth and sixth.) When you take the statement on page 41 and the statement on page 42 together, they do not set forth, in my opinion, with any distinctness whatever, if at all, the charge of misrepresentation. Then we come to the seventh article, which I must say is a very extraordinary one, and calls for an expression at least of astonishment on the part of the judge who considers it, recollecting the importance of the matter with which we are dealing, and the absolute necessity of some clear and intelligible and consistent specification. "The said Walter Irvine as having, or pretending, right to the said mortgage debt, was found by the said master to have received payment of the whole of this debt, both the principal and interest out of the estates of the said John Leith, being the produce of the old and new Grange plantation prior to 1819." Nineteen years after the deed in question, and he is to be charged with prescience, he is to be charged with a foreknowledge, forsooth, in the year 1798 with respect to one, and in the year 1800 with respect to the other, 21 years and 19 years respectively, of what was to be the produce of the crops of that very regular, established and uniform cultivation, namely, that of a West Indian estate, where there are no tornadoes, where there are no earthquakes, where there are no changes of weather, where every thing is as regular and mechanical as clock-work, as if it were a farm in Norfolk, or a farm in the East Lothians. That is what he is expected to have had a foreknowledge of in the year 1798, when he obtained the one deed; and in the year 1800 when he obtained the other. However, I dwell not upon that, because, of course, the present respondent does not mean to say that it is upon that extraordinary statement he depends. And let me add another thing with respect to the carelessness with which these pleadings are framed. One would have thought that if you wanted to charge parties with a gross fraud, you ought to have been a little more careful. What do you think of people who actually aver in their summons that the cause of *Leith v. Irvine* was carried by appeal to the House of Lords, and decided by

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the House of Lords on the 30th of March, 1833? Nothing of the kind. No appeal was made, they ought to have known that; they ought to have informed themselves of that; when they charged their fellow-Christians, their fellow-men, with gross frauds, they ought to take a little trouble to see what they are about, and especially when they rely upon the chancery proceedings as their excuse, and say that until the chancery case was over they did not choose to bring this action, or could not bring it, or were prevented, which is not true; they were not prevented, they did not choose to bring it till it was all over; they wanted to see what they were to gain by it, and how much. There was an appeal, no doubt, in the Chancery Court. I suffered under that appeal for twenty-five days. That was an appeal, but not an appeal carried, as the summons indistinctly sets forth, in so many words from the Court of Chancery to the House of Lords, and decided in the House of Lords on the 30th of March, 1833. No such thing; it never came near us; there was no appeal; it was an appeal from Sir John Leach, as master of the rolls, to me, as lord chancellor, and I decided it on the 30th of March, 1833. No doubt about that; and that is the knowledge I have of this case, and which has helped me not a little in going through it. My lords, I do not mean to say that goes to the question with which we are now dealing, but I give it in passing, to show the great and culpable carelessness and remissness which seems to have presided over the whole of this extraordinary case—a case, of all others, where time is material—a case, of all others, requiring the greatest care and the most deliberate and cautious circumspection.

I now come to the second head, which is the main ground of the charge of misrepresentation. That is in article 6 of the condescendence, to which I have already referred, where Walter Irvine is said, in certain proceedings in the Court of Chancery, no doubt it was his business, to have stated, as representing Charles Irvine, his brother deceased, the mortgaged debt due at 30.000*l.* or thereby. Now, upon this I would remark, that if it was intended to charge, as it is, wilful misrepresentation of the mortgage debt, the obvious course was not to insinuate or leave room for inference, from circumstances merely, but directly to aver that he, Walter Irvine, represented one thing, when he at that time, and so representing, knew another thing to be the fact; that he knew the value to be this when he represented it to be that; or that he represented it as one thing while he knew it to be another thing. This is not done, but things are stated from which it may be gathered inferentially that his representation was incorrect. Now, this is the very highest that we can put the averments at, namely, that things are stated from which it may be gathered that Walter Irvine's representations were incorrect, and incorrect to his own knowledge. But when we take all these accounts together, they do not even amount to this, for they end in averments which are quite destructive of the allegation of misrepresentation. The allegation, taken altogether, is self-destructive as an allegation of misrepresentation, just as if one were to say, "You pretend to rate the value at 1000*l.* when it is in fact twice 500*l.*, and so you deceive." But a state-

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ment that a thing is 1000*l.* does not deceive persons when you aver, as the ground of that deception and misrepresentation, when instead of 1000*l.* it is twice 500*l.* That is self-destructive as an averment of misrepresentation. Nay, in most cases there was no representation, but only an estimate, conjectural, which of necessity and *ex vi termini* was conjectural. Now look at article 6, and compare that article with the memorial; there the mortgage debt is attested to have been stated at 30,000*l.*, whereas the report of the master found it to be 22,841*l.*

Compare that with the memorial at page 42: "It may be further necessary to observe,"—now this is just as much parcel of the alleged misrepresentation as if it had been contained in the summons or the condescendence, because it is imported into it by way of reference. Walter Irvine is condescended upon as having made a representation by means of this memorial: "It may be further necessary to observe in regard to the debt due from the estate of Mr. Leith to Mr. Irvine, that the accounts of his intramissions are not yet finally settled, nor is it expected they will but in the Court of Chancery;" which proved too true, and they were not finally settled till the 30th of March, 1833. The balance due to Mr. Irvine was supposed by himself to be 37,000*l.* or 38,000*l.*; and from the before-mentioned transaction entered into between Mr. Christopher Irvine and the attorney of General Leith, it will have been observed the appraisement of the estate of Old Grange amounted to 31,026*l.* 14*s.* 4*d.*, and that estate was delivered over in due form to Mr. Irvine in part of his debt. Now let us look at article 28, in page 18. These affairs having not been accepted, Walter Irvine, on the 29th day of January, 1800, wrote a letter to his sisters, Mrs. Kirkpatrick and Miss Irvine. This is the letter on which reliance is placed, as showing misrepresentation, in which he thus mentions the settlement he had made with his sister, Mrs. Burn, and his brother Christopher. I do not go upon that, because that comes under the other head—under the head of concealment—at which I have not yet arrived; but the following is stated as the representation. In this letter, says the condescendence, he, Walter, mentioned the mortgage upon the property in these terms. Now here is the representation, the inconsistency of which, with the fact to his knowledge, is to be the ground of impeachment. We will suppose the Grange debt still to be from 15,000*l.* to 20,000*l.*; call it 18,000*l.* Can any man who knows the meaning of words, who is ever so little acquainted with the force of language, whether technical or in common parlance, fancy for a moment that this is a representation? It is an estimate, and a very conjectural estimate, and an estimate which leaves a large margin for conjecture. He does not say it is 15,000*l.*; he does not say it is 18,000*l.*; he does not say it is 20,000*l.*; but he says it is from 15,000*l.* to 20,000*l.* Call it splitting the difference, and inaccurately splitting the difference, 18,000*l.*; and how does he preface it? Not, it is so; not, I tell you it is so; not, I represent it as being so. We will suppose the Grange debt. Can any thing be more manifest than that that is any thing rather than a misrepresentation? It is actually saying, "Put it at so much; I do not know what it is, but I will take it to be so much; it is from 15,000*l.* to 20,000*l.*; suppose it be 18,000*l.*"

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Then it goes on in article 29, which also refers to it: "And in regard to the Grange debt." The first part of this article relates to the transaction with Christopher, which I reserve for the next head of my argument; but this is the part that refers to this representation: "And in regard to the Grange debt, instead of 18,000*l.* it was estimated by Walter Irvine himself, judicially on oath, within eighteen months of the time when he wrote this letter, at 30,000*l.*" Well, he might have been quite right at the one time in estimating it at 18,000*l.* and at the other at 30,000*l.*, and a man's estimate at different times, varying from the one to the other date, is not proof that he made a *de facto* representation at the one time, and that he *de facto* knew it at that time, for he may have known it quite differently when in the Court of Chancery he came to swear to it. The result, then, by these statements, so taken together, and which are made as averments of misrepresentation, is this: Walter Irvine estimated the debt at 18,000*l.*; he claimed 30,000*l.*; he fully and distinctly stated to his sisters that Mr. Leith or his agent set it at 17,622*l.* in the year 1792; he as fully stated to them that Charles Irvine believed it to be between 37,000*l.* and 38,000*l.*; that is in the statement of the pursuer that he said so; he himself, in his answer in chancery, set it at 30,000*l.*, and claimed that sum; but in that chancery suit, nearly forty years after the arrangement with his sisters, the amount was found to be 22,841*l.*, at which sum, on the final hearing of the appeal, I, and not the House of Lords, determined it, and decreed accordingly.

This is somewhat less of a misrepresentation, therefore, than the case which I put of the 1000*l.* and twice 500*l.*; it is rather as if the charge of misrepresentation were stating the 1000*l.* when the real value was 500*l.*; for it is an allegation that Walter Irvine had given in the sum of 37,000*l.* or 38,000*l.* instead of 22,841*l.*, or some 14,000*l.* or 15,000*l.* more against himself than it really was, or than he could know it to be, unless he were gifted with a foreknowledge of my decree, made nearly forty years after his alleged misrepresentation, and nine years after he had gone to his grave. As to what he is averred in article 28 to have said in his letter of the 29th of January, 1800, it is plainly not an averment that he made any representation at all for the reasons I have already given in dealing with that conjectural statement, that conjectural estimate, and nothing else.

Thirdly, the other charge of misrepresentation is, that Walter Irvine represented himself as having given 1200*l.* to Christopher in his transaction or accounts with that brother, and this is to be found in article 28, at p. 18. Now let us see how that is set forth. It signifies nothing; what was the fact?—but let us see how it is set forth: "I think it necessary to inform you"—now this is a letter giving an account after these events of their having happened—"I think it necessary to inform you, the settlement I made with Mrs. Burn stands thus: 100*l.* a year annuity to be paid on the joint lives of her and her husband in lieu of her rights; to our brother Christopher I paid"—not I have bargained for or bought it, but "I paid 12,000*l.* twelve months after he made the assignment. As for Mrs. Wardrobe, I never gave her a farthing." But ought not this to have been set forth thus: that

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he had said, "To our brother Christopher I paid 12,000*l.*, and no more, as a consideration for his share"? It is not so set forth; it is set forth, "To our brother Christopher I paid 12,000*l.* twelve months after he made the assignment." He is not there alleged to have given the terms of his bargain with Christopher; he is not talking of the terms of the bargain; he is saying nothing about the terms of the bargain; he is stating the facts, that twelve months after that bargain, whatever that bargain was, which he does not say a word of, he paid 12,000*l.* to this brother, which is not denied to have been the truth; but in the other parts of the summons and condescendence it is, in fact, stated to have been the truth; therefore that really and truly goes for nothing.

Next come we to the grave and greater charge of concealment. Now, the case stands thus: Christopher owed Walter money; it is not ascertained how much; it is called 5000*l.* or 6000*l.*, but that clearly means currency; it is 2000*l.* or 3000*l.* cash. Christopher and he appear to have been, and they are stated — I am taking it only from the pleadings; of course, I cannot travel out of them — to have been upon very cordial and amicable terms, to have lived upon the footing of affection in which brothers ought and generally do live; there seems to have been little or none of that affection towards the sisters. Christopher having claims upon the personalty, he, Walter, bargains with him for giving up those claims to him, Walter; and as to the bargain there is some little doubt upon even the pleadings, and I cannot go into the evidence, whether that debt was ever meant to have been exacted from his brother Christopher; but, be that as it may, assume that on the pleadings it is stated that he did owe him money, though that, like every thing else, is set forth rather inferentially than *de facto*, as it ought to be in such a case; assuming that he owed Walter money, and that Walter released that debt, and gave him 1200*l.* besides, and that there was added — for that is also stated in the pleadings — that he pressed upon him delicately, calling it a condition of the bargain, 200*l.* a year for his life, and 100*l.* a year for his surviving widow should he pre-decease her, that that was added *ex mera gratia*; there was possibly a little pressure, but at all events there is the transaction as it stands between them.

Now the charge of concealment is this, (and we are now upon concealment,) that he did not tell the whole of this transaction with his brother Christopher to his sisters, that he kept them in ignorance of it; and it is also set forth that Christopher, what is called, aided him in that concealment; it is distinctly stated that they arranged to conceal the transaction from the sisters, and the two brothers acted upon this arrangement. Christopher aided his brother Walter in misrepresenting the nature of the settlement between them, and advised his sisters to trust themselves in Walter's hands, and to confide in his generosity. Now, when a person is set forth as an accomplice in a fraud as accessory to, and sharing in, the commission of a fraud against his sisters, one expects to see it set forth how he shared. The concealment of a transaction is intelligible, but that the other party aids in the concealment is a most vague and indefinite and unsatisfactory averment. It is not said how or in what way, but at all events

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this is the averment, that the transaction with Christopher by which Walter became entitled to Christopher's share upon the payment of 1200*l.* and releasing a debt, was not communicated by him, Walter, to his sister, Mrs. Burn, or to his sister, Miss Irvine, or to the other two sisters, Mrs. Wardrobe and Mrs. Kirkpatrick, at the time or before the time when he obtained from them the two deeds, from Mrs. Burn the one, and from the other sisters the other; and it is said that keeping them in ignorance of the value of what he was getting from them for the argument is by way of inference only that Christopher's share was worth no more than theirs, and that if Christopher's share was worth the debt and the 1200*l.*, their share must have been worth the debt and 1200*l.* It is not denied that he told them of the 1200*l.* — that is admitted; but it is said as one of the charges that he did not tell them of the release of the debt, that he concealed therefore a part of the transaction. A concealment, to be material, must be a concealment of something that the party concealing was bound to tell. It is perfectly evident that if I go and bargain to buy a property with A. B., and if the person with whom I bargain, the owner of the property, has before that had an offer of 1000*l.* when he asks me 1500*l.*, and, to put it stronger, if he had hawked it in every part of the land market into which he could find access, and has found no person to offer him more than 1500*l.* and he asks me 2000*l.*, I have no right, if I give him the 2000*l.*, to bring him into a court of equity as having deceived me on the value of that property by having failed to inform me that others had only offered him for it 1500*l.*; that he had tried to get a better price for it and had failed to get a better price for it; and that yet he made me pay 2000*l.* for what he himself ought to have known he had never been able to get above 1500*l.* for. It is a mode of estimating the value of the property which he has taken himself; it is a mode of estimating the value of the property which does not bind him and does not benefit me. It might be his perfect right to make me pay 2000*l.* for what he had not been able to get 1500*l.* He had no duty whatever either at law or morally to tell me what he had done. His concealment of what he had done, his withholding from me the knowledge of what he had done, is no argument, even much less, is no ground, of equitable relief against him for a fraudulent concealment. It must be a concealment of something which he was bound to disclose. And Walter Irvine, past all possibility of doubt, was not bound to disclose what had taken place between him and his brother Christopher. But observe, I am putting the case lower than the fact, because the fact, as set forth in the record, is this: that the brother did not stand in the same relation towards Walter Irvine in which the sisters stood. The brother's bargain with Walter was made up partly of a claim of right, and partly of the favor and bounty of Walter. Walter was so fond of his brother that he not only at once released the debt, and gave him 1200*l.*, whether it was worth that or not, but he pressed upon him; he insisted upon it, says the averment in the condescendence; he insisted upon his taking 200*l.* a year for himself, and 100*l.* for his widow, should his wife survive him; all owing to kindness and favor towards that brother Christopher. Did

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the sisters stand in the same position? Was what passed between Walter and Christopher any rule for what should pass between Walter and them? No such thing. What passed between Walter and Christopher stands upon its own footing, and is totally independent of, and necessarily unconnected with, what was passing between Walter and his sisters. Therefore, I say that this is a concealment of that which the party was not bound to tell; it amounts to absolutely nothing whatever material that is alleged thus to have been concealed. I should say that it ought to have been set forth a great deal more particularly, even if it had been so, than it is in the 13th, 14th, 15th, 16th, and 17th articles. But not a word of all this, observe, appears upon the summons. Now the summons ought to contain that which the condescendence specifies more minutely, but here there is no generality whatever under which this can come except the general charge of fraudulent concealment. It should have been set forth that certain things passed between Walter and Christopher, which he was bound to communicate to his sisters, and did not communicate to them, and the not communicating of which was fraudulent. The statement is not by any means so, but it is far more precise than that of misrepresentation, with which I have dealt. Let us take that statement, therefore; let us put it as high as we can; and, admitting it to be validly alleged, let us see whether, when taken altogether, it amounts to a concealment not only of that which was material as tending to the price of the deeds, the making of the deeds with his sisters, but whether it is a concealment of something which they had a right from him to know, and his withholding of which amounted to concealment fraudulently one. In the fourth place, I come to article 23, on page 17, and which amounts to this, that Walter had been consulting with Mr. Pigot, afterwards Sir Arthur Pigot, who "advised him that the personal property descended to the nearest of kin, brothers and sisters," that is, not to Walter himself, provided the party was domiciled in Scotland. Miss Margaret Irvine had applied to Walter for some information as to Charles's succession, in which she and her sisters thought they must have an interest, and requested leave to wait on her brother respecting this business. Walter, on the 27th of April, returned the following answer: "Mr. Irvine begs leave to acquaint Miss Irvine that all persons who had claims on the estate of the late Charles Irvine were by public advertisement directed to lodge them with Mr. Charles Stewart, W. S., which he deemed sufficient notification; but for her more immediate satisfaction he begs leave to transmit a paragraph of an opinion he only received yesterday from an eminent solicitor in London. 'The whole of the real estate descends to the heir at law, who is his next eldest brother, if he died without issue and no will, and the personal estate equally divided amongst his brothers.'" I have yet to learn that a person receiving an opinion from an attorney or counsel is bound to give that opinion, and to give the case upon which that opinion was taken; for that is applied here by the usual mode of pleading followed in this extraordinary case by inference and insinuation, and not directly; it is implied that he ought to have given the case as well as the opinion.

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Mr. Irvine, that is, Walter, does not vouch for this opinion being the law. There is no very great misrepresentation even of the law. Those who think themselves aggrieved may have their recourse how they may. "If you are dissatisfied with Mr. Brown's opinion, whom I have consulted, you who have not seen my case, and which case I do not choose to show you, and which I am not bound to show you; if you choose to do so, get another opinion—a better opinion; do not take mine, for I do not vouch for its being the law, and I tell you nothing of the facts upon which it is given." The opinion without the case certainly, or the case without the opinion, is not worth much, but a man is not bound to tell his case any more than he is bound to give the opinion. He says, "I will not tell you. I will not vouch for its being law, and the case I will not show you at all. Those who think themselves aggrieved may have their recourse how they may." That is to say, "You know there are sisters as well as brothers; go and tell the facts, and get as many more opinions as you choose of the counsel you like best. In the mean time Mr. Irvine," that is, Walter, "does not consider himself answerable in any shape further than to secure his own rights." Really I think any thing less like a precise averment of misrepresentation, even as far as we have gone, I have hardly ever seen. But now the charge is partly insinuated and partly stated, and it is this—that he had consulted Mr. Pigot, and told Mr. Pigot there were sisters as well as brothers; that he had consulted Mr. Brown, or got an opinion from Mr. Brown, who only knew of the brothers, and not that there were sisters; and therefore it is inferred (this is only inferential, it is not stated) that Mr. Brown had been told by him that there were no sisters, but only brothers; and it is inferred that he tells the opinion of Mr. Brown, which does not mention sisters, and that he does not tell the opinion of Mr. Pigot, which mentions brothers and sisters. That is the charge.

Therefore the gist of this charge is, that he represented the law to be beneficial, a division to brothers and not to sisters, having got that law from a lawyer who did not know that there were any sisters, and who, if he had known that there were sisters, would have said, as Mr. Pigot did, that it must be divided between brothers and sisters, and that he did not tell the whole of Mr. Pigot's opinion, but only Mr. Brown's. Now as it stands, and without more, I do not think there is sufficient to warrant the charge. But be that as it may, it is completely contradicted, because we are to couple with the averments in article 23 the statement in the memorial to which we are referred at page 42, namely, the second page of the memorial. "If Mr. Charles Irvine,"—now this is Walter's representations to the ladies,— "if Mr. Charles Irvine is considered to have died domiciled in Scotland, then his personal estate will divide betwixt his youngest brother, the said Christopher Irvine, and Margaret, Eleonora, Isabella, and Ann Irvine, his four sisters; but should Mr. Irvine be considered a West Indian, or not to have been domiciled in Scotland, then Mr. Walter Irvine, the heir, will also come in for a share of the personal estate, and which, so far as had been learned, will consist of all crops off the ground in Tobago, in the storehouses there, or on its way to Britain,

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all debts due in the said island or elsewhere, by bond, mortgage, or otherwise, to the estate," together with all the other circumstances; and he sets forth a great number of particulars of very valuable property. Is that concealing what the law was, that the sisters were entitled as well as the brothers? On the contrary, it states it most fully and most correctly. It states it upon the supposition of Charles having died domiciled in Tobago, which Walter, for his own interest, always contended he had; it also states it upon the supposition of the fact, in my opinion contrary to Walter's opinion, that he had died domiciled for the last six years, from 1792 to 1798, in his own country, Scotland; and it states that in the one case he, Walter, would share in the personalty as heir at law, and that in the other case he would be excluded, and the sisters, with the younger brother, would take. That is just the very thing which Mr. Pigot's opinion told him, which he is charged with concealing, and which Mr. Brown's opinion did not tell him, and which he is charged with giving them as a misrepresentation. The memorial to which we are referred, as parcel of the representation, states the very thing which they say he ought to have stated. But that is not all, nor nearly all, for there is what puts this part of the case out of court more signally than the rest.

In order that the misrepresentation or the concealment (I care not which, this charge is made up of both) may be of any avail whatever, it must be *dolus clarus locum contractui*, it must inure to the date of the contract. If one party misrepresents or conceals, however fraudulently, however wrongly, and however wickedly, to another with whom he is treating, and if that other, notwithstanding the misrepresentation, discovers the truth, notwithstanding the concealment, gets at the fact concealed before he signs the contract, the misrepresentation and the concealment go for just absolutely nothing, because it must be *dolus clarus locum contractui*. It is of no avail if the party has, in whatever way, become acquainted with the truth at the time, but much more so if he shows that he has become acquainted with it in the very deed which is said to have been obtained from him by the party misrepresenting or concealing. Now, this very deed, I need not read it, contains a distinct statement both of the one and the other of the sisters, having claimed *quasi executors dative*, and next of kin to Charles Irvine, in Scotland, at Edinburgh, on the supposition of his having died domiciled in Scotland. There is an end, therefore, entirely of this head of misrepresentation or concealment.

Hitherto I have been dealing with the deed No. 55, — it is called 58 in one case, and 55 in the other, — I have been dealing with the question as regards the Misses Irvine. We now come to that with respect to Mrs. Burn, which need not detain us so long. The misrepresentation there is in article 19. "The first of his sisters with whom Walter Irvine effected a settlement was Mrs. Burn, who had married a clergyman. These people appear to have placed implicit confidence in Walter Irvine and his agent Mr. Steuart. Mrs. Burn" — here is the allegation of Walter's fraudulent misrepresentation to Mrs. Burn and concealment partly — "Mrs. Burn having applied to Mr. Steuart for information as to the personal succession, Mr. Steuart,

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on the 6th of June, 1798, wrote to her a letter, in which he represented it as uncertain whether the personal estate would be equal to pay the debts affecting it. This appears to have been the only information furnished to these simple-hearted people before they agreed to assign over their rights to Walter Irvine." Then comes the offer made by Walter. Is this a misrepresentation of Walter Irvine, or a concealment of Walter Irvine? It is a concealment of Mr. Steuart, and they attempt to bolster up that by the immediately preceding article 18, saying, that he did not tell Mr. Steuart the whole. He was not bound to tell Mr. Steuart the whole, if he did not choose. But it ought to have been alleged that Walter Irvine had, by his agent, misrepresented, and that he had told his agent so to misrepresent; for a fraud is never to be presumed against a man, much less is the misrepresentation of his agent to be set down to the debit of his account, as fraudulently misrepresenting himself. Nothing can be more clear than that that fifth and last head of this case is quite unsupported.

My lords, I come therefore to the conclusion that, upon this record, no judgment can pass to sustain these charges. I come to this other conclusion, that judgment of *absolvitur* must be immediately passed, assoilzing the defenders from the conclusions of the summons; and I have great satisfaction in thinking, that besides the argument which I have held upon the lapse of time, that besides the topics to which I have had recourse upon the frame of the record, and upon the frame of the issue, it being unnecessary to decide the question of the conjunct verdict, that is, the conjunct issue and the verdict for the pursuer, without specifying whether concealment or misrepresentation, because I am of opinion that there is neither an allegation of misrepresentation nor of concealment, and that question could only have arisen if there had been a valid allegation of the one, and an insufficient allegation of the other; but there being neither an allegation of the one nor of the other, of course, in that case, the question of the pleading it is now unnecessary to deal with or dispose of; it gives me great satisfaction, upon looking anxiously into the opinions of the learned judges, three of whom expressed a very doubting and hesitating opinion in favor of the verdict of the jury, the fourth of whom expressed a clear, deliberate, and, in my opinion, a well-considered and a well-reasoned opinion against the verdict of the jury. It gives me unspeakable satisfaction that I do not dispose of this case without having not only well weighed those learned and elaborate opinions, but having gone into the mass of the evidence itself. If I had been sitting in the court below, I should have differed from the majority of their lordships, and have agreed with the learned president, in being utterly dissatisfied with the verdict. But that is not now for you or for me to consider; I go upon the grounds which I have already stated, and it is for me to add that, in my opinion, the fair fame and reputation, as an honest man, of Walter Irvine, has passed through this ordeal, and is, in my deliberate and unhesitating opinion, wholly untarnished.

Interlocutors reversed. Defenders below assoilzied from the conclusion of the summons, with costs below, except as to certain of the proceedings.

CASES

HEARD AND DETERMINED

BY THE

JUDICIAL COMMITTEE AND LORDS

OF

THE PRIVY COUNCIL;

DURING THE YEARS 1850 AND 1851.

[*Present* LORD LANGDALE, M. R., *The Right Hon.* BARON PARKE, *The Right Hon.* STEPHEN LUSHINGTON, *Judge of the Admiralty Court*, *The Right Hon.* T. PEMBERTON LEIGH and *The Right Hon.* SIR E. RYAN.]

DOOLUBDASS v. RAMLOLL.¹

June 26, 27, 28, and December 9, 1850.

Gambling — Statutes — Fraud — Auction — Conspiracy.

Statutes restrictive of suits on wagers are prospective only, and do not affect transactions which took place before the passing of the act.

Where two parties enter into a wager as to the price of opium at a certain sale, each knowing that the other would use means to influence the price, it is no fraud on one party that the other party raises the price by bidding at such sale.

Employing agents to bid for such a purpose is not an unlawful conspiracy.

A. having a right to purchase a certain quantity of opium at a sale, no fraud on the vendors is committed by bribing the agent of A. to exercise that right.

THE appellants in this case, as well as the respondents, were Hindoos, engaged in the business of merchants and bankers, in Bombay. On the 20th of October, 1848, the appellants and respondents mutually entered into verbal contracts, by way of wager, to the effect that the respondents would pay to the appellants such a sum of money as should be equal to five times the amount of the difference between the average price of one chest of Patna opium, of the opium to be sold at the first public government sale of opium at Calcutta, to be calculated according to the actual price which the whole amount of Patna opium which should be sold at such sale should realize, and the sum of 1386 rupees, if such average should be less than 1386 rupees; and that the appellants would pay the

¹ 15 Jur. 257.

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respondents a similar sum if such average should exceed the sum of 1386 rupees. On the 20th of August, 1846, a government notification was given, that on the 30th of November, 1846, 2405 chests of opium would be put up for sale at Calcutta, under nineteen conditions of sale; that the opium would be offered at an upset price of 400 rupees per chest; that if 2405 chests should not be sold, it should be competent to the board of customs, salt, and opium, to dispose of the lots which remained on hand at future sales; that eight other sales would take place in the seven ensuing months; that under the sixth article of the convention between Great Britain and France, of the 7th of March, 1815, the agents in India of his majesty the King of the French, or persons duly appointed by them, were entitled to demand, that out of the quantities of Behar and Benares opium declared as above for sale in the said nine sales, there should be delivered to them, at the average of the particular sale or sales to which the opium so applied for might belong, a quantity not exceeding in the aggregate 300 chests. The Indian government has the monopoly of opium, and these sales afford the public the opportunity of purchasing opium. It seemed to have been very common to make wagers, similar to the contract above stated, on the price of opium at these sales.

It appeared clear, from the evidence, that the respondents, having entered into a variety of similar contracts, procured persons to bid at the first sale, and, in fact, the biddings were forced up till the price bid for the first lot was 130,000 rupees, and the biddings continued till four o'clock, when the government officer stopped the sale; and the opium was again put up for sale on the 4th of December, 1848, with an additional condition, that it should be lawful for the government officer to withdraw any lot, and put it up again at an upset price, diminishing the same till a *bona fide* bid was obtained. About this time some of the respondents' agents purchased from the French consul at Calcutta the right to demand the 300 chests, paying him 30,000 rupees for it, in order, as the appellants alleged, to reduce the number of chests offered for sale. The sale took place on the 7th of December, when the respondents and their agents, and many other persons, appear to have attended, and 1315 chests of Patna opium were purchased by the respondents, through their agents, at an average price of 1793 rupees. The respondents were said to have afterwards sold some chests at 1200 or 1300 rupees. The respondents afterwards brought an action on the contract in the Supreme Court of Bombay for the difference; to which the appellants pleaded, first, *non assumpsit*; secondly, fraud and covin; thirdly, that the average price was enhanced by fraud and covin; fourthly, that the sale which took place was not the first sale, according to the contract. The respondents replied *de injuria* to the special pleas, and issue was joined. The trial took place in March, 1849, before Sir E. Perry, C. J., and Yardley, J., and on the 4th of April the chief justice found a verdict for the plaintiffs, (the respondents,) and Yardley, J., for the defendants. The verdict was, therefore, entered for the plaintiffs; from which decision the defendants appealed. Evidence was given to the following effect:

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That the native merchants' houses entered into such transactions extensively, and had done so for the last thirty years; that persons who speculate for the rise usually attend at the sales, and buy the opium themselves; that it was always known beforehand who were the great speculators; that the speculators for the fall might prevent persons from entering the auction room; that it was well known all over India that the respondents intended and had threatened to buy up all the opium.

Bethell and *Leith*, (with the *Attorney General*, absent,) for the appellants. We contend, first, that there has been a fraud and conspiracy, offences against the common law; secondly, if they do not amount to an offence, still the acts of the respondents are so fraudulent as to prevent their recovering on these contracts; thirdly, the price bargained for was a fair average price, which this is proved not to have been. The former decision, 4 Moo. Ind. App. C. 339; 12 Jur. 315, merely amounts to a decision that this contract is not void *per se*; but it is not decided how far this case is affected by the Indian Act, (21 of 1848,) which renders all wagers illegal, including this. The time mentioned in the contract for ascertaining the price was the first public sale; and that part of the contract was left incomplete, and to be determined at a future time. If, therefore, the proceedings at that time were vitiated by the conduct of the respondents, the contract is incomplete; and we contend that their proceedings were illegal, and vitiated the contract. They amounted to a conspiracy. 4 Steph. Com. 264. *Rex v. Waddington*, 1 East, 143. *Rex v. De Berenger*, 3 Mau. & S. 68. *Thornett v. Haines*, 15 M. & W. 367.

Sir F. Kelly, *Peacock*, and *Leach* for the respondents.

Leith, in reply.

The various arguments are fully referred to in the judgment.

December 9, 1850. The judgment of the court was delivered by

PARKE, B. This case was fully argued before their lordships at the sittings after last Trinity term. It is an appeal from the judgment of the Supreme Court of Bombay, in an action commenced in January, 1847, on forty-five wager contracts entered into in October and November, 1846, that the average price which a chest of Patna opium should be sold for, and realize, at the first public government sale, should exceed a certain fixed price. The plaintiffs in the different counts aver what the average price at that sale was, and seek to recover the differences between that price and the fixed sum per chest, amounting to a very large sum of money.

The defendants pleaded — first, the general issue; secondly, that the plaintiffs caused them to enter into and to make the several contracts, and that the defendants were, in fact, induced to enter into

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and make the same through the fraud and covin of the plaintiffs, and of other persons in collusion with them; thirdly, that the average price per chest of the Patna opium so sold at the said public government sale was an average price, obtained by and through the fraud and covin of the plaintiffs and others in concert and collusion with them; and lastly, a plea was added, which was in substance that the term "first government sale" denoted such a public auction sale as should be held subject to certain accustomed terms and conditions, and not otherwise, as should then next take place, and that no such public sale did take place, but that a sale took place subject to terms materially different.

The plaintiffs traversed each special plea by the general replication *de injuria*; and the cause came on to be tried in March, 1849, before Perry, C. J., and Yardley, J., who, after time taken to consider, differed in opinion, and pronounced their verdict on the 2d of April, 1849. Both agreed in finding a verdict for the plaintiffs on the first and last issues, but on the second and third the chief justice was in favor of the plaintiffs, Yardley, J., of the defendants; and, as provided for in such a case, the judgment was given according to the opinion of the chief justice, and the sum recovered was given with interest and costs, and against that judgment there is an appeal.

In the argument before us, the objections which we collect from the papers were taken in the court below, were renewed, and additional objections urged to the plaintiffs' right to recover. I will shortly recapitulate those objections, and it will be then found that the main question to be decided is a mere question of fact. One of those objections which were taken at the trial was, that the contracts were not proved to have been made by the defendants' authority, and that if proved they were not properly described, being contracts, as they were in form, for the purchase and delivery of opium, not wagers or contracts for the payments of differences, as alleged. Their lordships were of opinion, and expressed that opinion in the course of the argument, that there was ample evidence of the authority of the defendants' brokers to make the contracts, and also that the real nature of these nominal purchases was, that they were contracts to pay differences; so that the unanimous decision of the court on these points must be deemed quite satisfactory.

Another objection also was taken on the trial, arising on the fourth plea. It appeared that the course was, that all sales of opium, of which the East India Company had the monopoly, took place at stated periods, which were advertised; and at the time of the contracts the first sale of opium was advertised for the 30th of November, 1846, subject to certain conditions. This sale turned out to be abortive, as the whole day was spent in bidding up the opium to an extravagant price, and the company's agents would not allow the sale to take place. The sale intended for the 30th of November was postponed till the 7th of December, and fresh conditions were presented for that sale, which took place then; all the opium was sold, and the average price of a chest exceeded that which the plaintiffs and the defendants had fixed upon in their wagers.

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It was contended for the defendants, that the first sale mentioned in their contracts was meant to be a first sale subject to the then usual conditions, and as there had been no such sale, the event contemplated had never occurred, and therefore the wager had not been lost. If the additional qualification, that the first government sale should be a sale subject to the same conditions as were then imposed, could be imported into the contract by parol, (which we need not decide,) the evidence, as the court has already intimated, did not prove any usage of trade to that effect. Indeed, there is evidence to the contrary. That objection, therefore, fails.

But it was also contended that the exposure to sale on the 30th of November was the first sale meant by the contract, and that on that sale there was no difference between the price fixed and that actually realized, because no price was obtained, and therefore the wager had not been lost; and though this had not been made the subject of a plea, yet that it was an available objection in reduction of damages, and that only nominal damages should be recovered, as there was in effect no difference to be paid. We, however, think that, according to the true construction of the contract, the price of the first actual sale was the object of the wager, and the intended sale on the 30th of November was not a sale, but the sale on the 7th of December was the first sale. This objection, therefore, also fails. Two other objections, one of which could not be, and the other was not, urged in the court below, were also taken, on both of which their lordships intimated their opinion in favor of the respondents, and they see no reason now to alter it.

The first was, that since the contracts were entered into, and since the commencement of the trial in the court at Bombay, these contracts were rendered invalid by the act of the governor general in council of the 10th of October, 1848, intituled "An Act for avoiding Wagers;" and therefore the plaintiffs could not have judgment, and this judgment ought to be reversed.

That act provides, "that all agreements, whether made in speaking, writing, or otherwise, by way of gaming or wagering, shall be null and void; and no suit shall be allowed in any court of law or equity for recovering any sum of money or valuable thing alleged to be won on any wager, or intrusted to any person to abide the event of any game, or on which any wager is made."

Their lordships are of opinion that this legislative act is not to be construed as affecting existing contracts, at all events not those contracts on which actions have already been commenced, for statutes are *prima facie* deemed to be prospective only *nova constitutio futuris formam imponere debet, non preteritis*, 2 Inst. 392, and there are no words in this act sufficient to show the intention of the legislature to affect existing rights. Their lordships agree in the judgment of the majority of the Court of Exchequer on the construction of the corresponding act of the Parliament of the United Kingdom in *Moon v. Dorden*, 2 Exch. 22; 12 Jur. 188.

In the next place it was contended, that, by the Hindoo law, such contracts were void, and that this objection was open to the appellants, the declaration being on the face of it bad.

Their lordships have already said that they are not satisfied, from the authorities referred to, that such is the law amongst the Hindoos; and supposing that, *prima facie*, the contracts are to be taken to be between persons of that nation—a point on which we need say nothing—we think we cannot say that the contracts were illegal, especially as the point was not made in the court below, which had better means of deciding that question than we have.

It remains, therefore, for us to consider the other and the main objections to the right of the plaintiffs to recover, arising on the second and third pleas, which have been most relied upon in the argument before us.

For the appellants (the defendants below) it was contended that it was a fraud on the defendants, on such wagers as these, to bring about the event by which each wager could be won by acts of their own; that such fraud was meditated and prepared by the plaintiffs before the contracts were entered into, and therefore, the defendants, meditating no such acts on the part of the plaintiffs, the contract was void on the ground of fraud on them; and the second plea should have been found for the defendants, or if not, that, at all events, the meditated fraud having been carried into effect, and the prices raised by the acts of the plaintiffs and their agents, those prices were fraudulently raised as against the defendants; and therefore the third plea ought to have been found for the defendants.

This point appears to their lordships to be purely a question of fact depending on the evidence. It may be conceded that there was evidence, not that any steps were taken to enhance the price by employing persons to bid at the intended sale prior to the date of the contracts, but to raise a reasonable inference that the plaintiffs at that time meant by their own acts to raise the market; and then the question would be, whether this intention would enable the defendants to avoid the contract under the second plea. Further, there was, no doubt, ample evidence that the plaintiffs did try to raise the price at the sale by their own acts, and did succeed in so doing; and the question is, whether those acts are a fraud on the defendants within the meaning of the third plea.

This, the main point in the case, and which applies to both pleas, depends entirely on the question of fact, What was the understanding of the parties to the contract when it was made? Both the learned judges of the court below appear to have agreed on this being the question.

The chief justice, in his very able judgment, most correctly states, that if the event on which both parties were speculating was the market price as it should be governed by the ordinary cases of supply and demand, or as it should be governed by the contests of speculators wholly unconnected with the plaintiffs, then undoubtedly the plaintiffs would have taken a fraudulent advantage, and the event brought about by their own agency is not the event which was contemplated in the contract of hazard entered into by the parties; and Yardley, J., agrees in that position, and illustrates it by a simple supposed case, in which it would be manifestly a fraud, in one of the

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contracting parties, against the other, himself, by his own act, to win the wager; as where a man bets that a horse would fetch a certain price at an auction, he could not win the wager by bidding that very sum; and there can be no doubt upon that proposition.

But the true question is stated most correctly by the chief justice to turn on one point, Was it understood by the parties, at the time the bets were made, that it was competent to the plaintiffs to enter into the market as speculators, and endeavor to raise the price by their own biddings? And this is the question of fact on which the two learned judges differed, Yardley, J., thinking that the evidence did not prove any such understanding — indeed, going so far as to intimate an opinion that nothing short of the expression of that understanding in the contract itself would be sufficient; the chief justice being of opinion that the understanding was most clearly proved; that the defendants knew well when they made the wagers that the plaintiffs would use all their efforts, and all the power which their command of capital gave them, to run up the prices at the sale; and that the defendants contracted with them on those terms, and that the wagers were, in fact, nothing more than one speculator backing his own opinion against that of another on an event to be operated upon by the wealth, faculties, and judgment of both parties; that, according to their mutual understanding, each, therefore, had a right to use the means in his power, and to elevate the market price by bidding and inducing others to bid, the others to depress it by persuading persons not to bid, always supposing that such means were otherwise legal.

Upon a full consideration of the evidence, their lordships are of opinion that the view taken of it by the chief justice is the correct one, and think his decision as to the matter of fact fully warranted and called for by the evidence set out in pp. 40, 41, 52, 55, 78, 82, 84, and 88 of the joint appendix.

The plaintiffs had entered into a great speculation, the success of which was very doubtful, and depended on the amount of capital they could produce when the opium was to be paid for, and the number of wagering contracts they could make upon the price of it in the mean time, and also upon the greater activity of themselves and their agents in bidding to raise the price, than that of the defendants or their agents in endeavoring to lower it. This, we think, is clearly proved.

It is true that some of the witnesses use the expression that it was the practice for the speculators for a rise to attend themselves and bid at the sale, and an argument is used that the evidence shows only an understanding that the contracting party should himself bid; but the witnesses do not state negatively that another or others might not attend on his behalf, and one of the witnesses, as Dadebhoy Rustomjee, gives evidence that speculators for a rise influence the market, and that a large purchaser always bought through several hands. So far as relates to the understanding between the parties as to what it is competent for either to do, we think that the evidence does not show that the parties were to be confined to their own personal efforts,

by bidding themselves or inducing others not to bid, but that they are at liberty to employ agents, and not one agent only, for these purposes, without breaking the contract between them. Whether the employing of more agents than one will render the act of bidding illegal as to third persons, is another point which will afterwards be considered ; between the parties we think it was clearly no violation of their mutual understanding so to do.

Their lordships think, therefore, that the efforts made to raise the market by the plaintiffs, by bidding by themselves and agents, were no fraud on the defendants, as such course was, according to the understanding of both parties, to be pursued, and consequently that the intention to use those efforts was not a fraud which rendered the contract voidable by the defendants. But it was further argued, that even admitting that there was no fraud on the defendants by pursuing that course, the acts done by the plaintiffs and their agents were a fraud on third persons, and therefore illegal, and that the contract might be avoided by reason of that intended fraud, or at all events that the plaintiffs could not recover damages, which they were only entitled to do by reason of that fraud on third persons. It would seem from the report of the judgment in the court below, that this view of the case was not pressed on the learned judges. Both consider only whether this conduct would be a fraud on the contracting parties ; and the chief justice states that the acts were admitted to be "not otherwise illegal."

But, on the hearing of this appeal, this further objection is brought forward, and we are bound to dispose of it. The objection is, that the means used, by bidding merely to enhance the price, was a fraud on those who were intending to purchase *bona fide*, and especially when others conspired with the plaintiffs to bid for the same purpose ; and further, that the act of giving to the French consul the sum of 30,000 rupees, to induce him to exercise the option given by treaty to the King of the French to buy 300 chests, was also a fraud on the East India Company, and the average price having been raised by these acts conjointly, the plaintiffs could not recover if either was illegal.

It was argued on behalf of the respondents, that this species of fraud and consequent illegality did not fall within the meaning of the third plea ; and so their lordships are disposed to think ; but being unwilling to dispose of so great a case upon a point of pleading, they proceed to consider whether the defendants are entitled to succeed on the merits.

With respect to the bidding by one of the plaintiffs himself, said to be done merely to enhance the price, their lordships think it was no fraud on any one. There is no law which prevents any person buying any quantity of a commodity at any price that he likes, whether to use himself, or to sell again in gross or by retail, or to give away, or to prevent another having it ; provided always that he does not commit the common-law offence of forestalling or regrating, which this is not, or ingrossing, which the authorities show can be committed only with respect to the necessaries of life ; provided also

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that he makes no false representation in order to effect the purchase.

In all these cases, the buying of any commodity when the purchaser does not want it, necessarily raises the price, and so causes a damage to all others who do, and who buy for the purpose of using it, but the purchase is not, on that account, a fraud on them. The market is open to all who buy, whatever their object may be. Whether the plaintiffs meant to buy to sell again at a profit, or to make their profits by the collateral contracts that they had entered into with others, appears to their lordships to make no difference.

But it is said, that the fact of employing several agents, who were all cognizant of the purpose as well as the plaintiffs, constituted an illegal conspiracy, an indictable offence, and the plaintiffs cannot therefore recover a difference of price created by that illegal conspiracy. But as far as the doctrine of conspiracy has been extended, we do not find that there is any satisfactory authority that this would be an indictable offence where there was no *crimen falsi* committed, when the commodity is not a necessary of life, to which only, as has been said, the offence of ingrossing or regrating applies — a charge of a description which certainly ought not to be extended, and which itself would not meet with much countenance in these times, when the true principles of trade and commerce are better and more generally understood.

The *dictum* of Gurney, B., in the case of *Levi v. Levi*, 6 Car. & P. 671, was much relied upon, to show that an agreement of several not to bid at an auction was an indictable offence; but this was a mere *dictum* in a *nisi prius* case, and cannot, we think, be relied upon.

It is argued, however, that this proceeding by bidding by the plaintiffs themselves, or in conjunction with others, is analogous to "puffing," and is illegal on the same principle. But the distinction is in our judgment plain. A puffer is not a real bidder; by arrangement between him and the vendor his bid is to go for nothing; but as to the competing bidders, it appears to be what it is not, a real bidding, and the vendor, by authorizing it, is guilty of a fraud on them, and cannot profit by it.

Here the plaintiffs and their agents are all real bidders. He whose bid is the highest is bound to pay the price, and no false colors have been held out to other intended buyers.

Another point insisted upon before us was, that the purchase of the option reserved to the French government was illegal.

By the 6th article of the convention between Great Britain and France there is reserved by the French government, or those employed by them, the right to request a reserve of not exceeding 300 chests a year, and if the quantity required is not taken and paid for in the agreed period, the quantity required is to go in reduction of the 300 chests. The plaintiffs purchased from the French consul this option for 30,000 rupees, meaning not to exercise the right of purchase, but to cause that quantity to be retained, and so to diminish the quantity of opium to be sold at the sale. The requisition was accordingly

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made, and the quantity offered for sale at that sale diminished by 300 chests.

It was argued that this was a fraud against the East India Company, the vendors, who were thereby prevented from selling the 300 chests at that sale, which they would have done if the French government had been left to itself. But their lordships do not think that this is a fraud on the company. By the treaty the French government has an unlimited power of exercising the option, and may do so for any reason they think fit, and the East India Company have no right which is infringed upon by the exercise of the option for a collateral pecuniary advantage. It was, indeed, insinuated that this sum was given as a bribe to the French consul, and was therefore a fraud on his government; but it is not proved that the money was given as a bribe, but it must be intended that it was given for the use of the French government. Their lordships therefore think that none of these objections are sustained, and that the plaintiffs' conduct does not appear to have been illegal. However much they disapprove of these wagering transactions, (which happily are now put an end to,) however disreputable and unbecoming in men of a nice sense of honor, or of high mercantile character, the means adopted by the plaintiffs to win their wager may be, still we cannot pronounce them to be fraudulent in contemplation of law, which only seeks to lay down broad rules for the government of human conduct, applicable to all classes of persons, and does not exonerate parties from their contracts (which it is its primary duty to enforce) on the ground of fraud, except where they are distinctly shown to be in violation of the ordinary rules of morality. Our attention was called to the decision of the learned judges of the Supreme Court of Calcutta in a similar case. The judges of that court, on the trial, considered the conduct of the plaintiffs as not fraudulent, and gave their verdict for the plaintiffs *at nisi prius*. That opinion they subsequently changed. What the particular facts in evidence were, to show that it was the understanding of the contracting parties as to using all means to raise or depress the prices, does not appear, and therefore we are not in a condition to say what the verdict ought to have been; but the opinion delivered by those learned judges, on the supposition that there was such an understanding, that the bidding was a fraud on third parties, we cannot think to be well founded.

We are of opinion, therefore, that the plaintiffs were entitled to recover in this action.

Two subordinate points remain for consideration. First, as to interest, we think the court below were warranted in giving it, for it appears that interest was accustomed to be paid on such pecuniary transactions. Lastly, as to costs, we concur in the opinion of the chief justice, that the general rule should be, that they follow the event of the verdict; and in this case, as the verdict for the plaintiffs was in the judgment of their lordships right, they ought to have their costs.

We shall, therefore, recommend to her majesty that the judgment should be affirmed; and the appeal is dismissed, with costs.

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Bethell. I do not know whether your lordships would not think, that, as there was a difference of opinion with the two learned judges in the court below, there should be no costs.

PARKE, B. No; we think the costs ought to follow the event.

[*Before the Lords of the Committee of Council for the Affairs of Jersey and Guernsey. Present The Right Hon. the LORD PRESIDENT; LORD LANGDALE, M. R.; The Right Hon. SIR G. GREY, the Secretary for the Home Department; LORD CAMPBELL, the Chancellor of the Duchy of Lancaster; and The Right Hon. SIR S. LUSHINGTON, the Judge of the Admiralty Court.*]

*In re BELSON.*¹

January 24 and February 5, 1850.

Habeas Corpus — Appeal — Costs.

A writ of *habeas corpus*, issued by the lord chancellor, and sealed by the chief clerk of the records and writs with the official seal, will run into the Island of Jersey; and the Royal Court there is bound to register such writ, and to aid and assist in its execution.

An appeal will lie to the lords of the committee of council from a provisional order of the Royal Court of Jersey.

In an appeal by husband against wife, the court will not make an order for security for costs against the husband.

THIS was the doleance or petition of Frederick Belson, Esq., complaining of the refusal of the Royal Court of Jersey to register a writ of *habeas corpus*, issued in pursuance of an order made by the vice chancellor of England on the 6th of November, 1849, and two warrants of the lord chancellor, and praying an order or direction from her majesty in council to the Royal Court of Jersey to register and publish the order and warrants, and to aid and assist in their execution.

The facts were as follows: In January, 1849, Maria Elizabeth Belson, the wife of Frederick Belson, the appellant, presented a remonstrance to the Royal Court of the Island of Jersey, setting forth that her husband habitually labored under a state of great mental excitement, which often deprived him of his reason, and alleging various acts of ill treatment to herself, and that, in consequence of his state of mind, he was incapable of having the care of or directing the education of their children, two of whom were sons, one of eight, the other of three years of age, and one daughter, aged seven years; and Maria Elizabeth Belson prayed that, after proof of the facts alleged, a separation, as far as regarded property, might be granted to her from her said husband, and that he might be adjudged to pay her an annual sum of 250*l.* for herself and the maintenance of her

¹ 14 Jur. 631.

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children. The said suit for a separation came on to be heard before the Royal Court on the 14th of April, 1849, when, the husband (defendant) having put in a plea denying the allegations contained in the remonstrance, the case was put to proof. Witnesses were in the course of examination, and the cause was at the date of the appeal pending before the Royal Court. On the 14th of March, 1849, the defendant presented a remonstrance, complaining that his wife had deserted her home, and taken with her her two youngest children, and praying that the proper officer might be directed to enter the house where the said children were detained, and deliver them to the care of the petitioner; and upon that occasion the inferior number of the court were of opinion to grant the prayer of the remonstrance provisionally, without prejudice to the ultimate decision of the wife's suit. On the 14th of April, the full number of the Royal Court having been convened for that purpose, Maria Elizabeth Belson presented a remonstrance to the court, complaining of the *ex parte* decision of the inferior number of the 14th of March, and offering to prove the total incapacity of her husband to have the custody of his children; and the said Frederick Belson having, by counsel, appeared to answer, the full number of the Royal Court pronounced the following decree: "Considering that the said Maria Elizabeth Berkeley, (Mrs. Belson,) on the 20th of January, presented a remonstrance to the court, alleging, amongst other things, the state of excitement and mental alienation of the said husband, and praying a separation from her said husband, and alimony for herself and her children; that, by an act of the court of the 14th instant, it is ordered that evidence shall be heard in this action; that the remonstrance to the full court, on the part of the said Maria Elizabeth Belson, reproduces the allegations of the mental alienation of her said husband, and an habitual state of mental excitement, which renders him incapable of having the care of his children, or of directing their education; the court suspends the effects of the said act or order of the 14th of March, 1849; and considering that the two youngest of the said children are a girl and a boy, the former only seven years old, and the latter only three years of age, and that, under those circumstances, they more especially require the care of a mother, the court has ordered that they should be left provisionally in the custody of the said Maria Elizabeth Belson, their mother." From this decision the petitioner, Frederick Belson, prayed an appeal to her majesty in council; but the Royal Court refused to grant the liberty to appeal, on the ground that the order was a provisional and not a definitive sentence.¹ The children having been made wards of the High Court of Chancery in England, on the 23d of August, in the same year, the appellant, Frederick Belson, presented a petition to his honor the vice chancellor of England, supported by an affidavit, stating that the infants, Mary Juliana Belson and Frederick John Belson, were at St. Heliers, in the Island of Jersey, under the custody and control of their mother, and of William Henry Hartman, their step-grandfather, and praying an

¹ This decision overruled; see end of case.

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order that a writ of *habeas corpus* might issue, directed to Maria Elizabeth Belson, the mother of the infants, and to William Henry Hartman, to bring the said infants before the High Court of Chancery, at Belle Vue, Southsea, near Portsmouth, in the county of Hants, on the 12th of September then next. The order was made accordingly; and, in pursuance of such order, a writ of *habeas corpus* was, on the 5th of September, 1849, issued by the lord chancellor, at the instance of Frederick Belson, the father, out of and under the seal of the said High Court of Chancery, from the office of the clerks of the records and writs, which writ was in the following form: "Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to Maria Elizabeth Belson and William Henry Hartman, greeting. We command you, and each of you, that you do, on Wednesday, the 12th of September, at ten o'clock in the morning, bring before us in our Court of Chancery at Belle Vue, &c., the bodies of Mary Juliana Belson and Frederick John Belson, by whatsoever name, or addition of name, they are known or called, who are detained in your custody, to perform and abide such order as our said court shall make in this behalf; and hereof fail not, and bring this writ with you." The writ of *habeas corpus* having been issued as a writ to run into and be executed in the Island of Jersey, the same was, on the 7th of September, 1849, duly served on Maria Elizabeth Belson and William Henry Hartman, the officer tendering at the same time the money for travelling expenses. On the 12th of September, the day named in the writ, Maria Elizabeth Belson and William Henry Hartman attended before the vice chancellor, when it was ordered that the matter should stand over until the first day of the then next Michaelmas term, they undertaking not to remove the children from Jersey, except by bringing them to England. The said Maria Elizabeth Belson and William Henry Hartman not appearing on the first day of Michaelmas term, and not having made any return to the writ, a declaration was made, on the petition of the appellant, Frederick Belson, by his honor the vice chancellor of England, that their conduct was a contempt of the court, and it was ordered that they should stand committed to the custody of the keeper of the queen's prison until they should clear their contempt, or further order; and accordingly a warrant was signed and issued by the lord chancellor of Great Britain, bearing date the 13th of November, 1849, addressed to W. H. Allen, the tipstaff of the High Court of Chancery, or his deputy, willing and directing him to make diligent search after the body of the said Maria Elizabeth Belson, and, wheresoever he should find her, to arrest and apprehend her, and her safely to convey to the queen's prison, there to remain until further order; and a similar warrant was at the same time issued against William Henry Hartman.

By an order of the king in council of the 21st of March, 1769, duly enrolled, the laws and privileges of the Island of Jersey were confirmed as of ancient times; and it was provided that no orders, warrants, or letters missive of any sort should be put into execution within the island until after having been presented to the Royal

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Court, in order that they might be registered and made public; and in case any such orders, warrants, or letters missive should be found contrary to the charters and privileges, or burdensome to the said island, the registry, publication, and execution might be suspended by the Royal Court until the case had been represented to his majesty, and his will and pleasure on the same signified. On the 15th of November the tipstaff arrived in the Island of Jersey, and, conformably to the said order of the king in council, made application, by her majesty's attorney general in Jersey, to the knight bailli of the island, and afterwards to the Royal Court, to register the order of the vice chancellor of England and the warrants of the lord chancellor, and for assistance in executing such warrants. On the 17th of November, the application for registration being reiterated before the full court by Mr. Allen, Maria Elizabeth Belson and William Henry Hartman demanded to intervene, and claimed the protection of the court, to oppose the registry and execution of the said order, on the ground that such registry and execution would have the effect of withdrawing from the jurisdiction of the court a cause that was pending therein, and which, according to the charters and privileges of the island, could not be taken before another tribunal, except by appeal. On the 21st of November following, the court, after stating the facts, delivered their judgment, of which the following is a translation: "With regard to the demand in intervention, considering that the said William Henry Hartman and Maria Elizabeth Belson have interest in the cause, the court have admitted their intervention; and regarding the demand of Mr. Allen, considering that the Royal Court of this island is independent of all other authority, save her most excellent majesty in council, and as it is specified in the charters granted from time to time to the inhabitants of this country by their sovereigns, that no orders or warrants proceeding from the English courts can be put in execution in this country, unless they are sent in virtue of an order from her majesty in council, the court have unanimously judged that the demand of the said W. H. Allen was not allowable."

The appellant, Frederick Belson, thereupon presented his petition of appeal to her majesty in council, praying her majesty in council to declare and order that the writ of *habeas corpus*, issued under the seal of her majesty's High Court of Chancery of Great Britain, did of right run into, and ought to be obeyed within, the said island; also to order and direct the said Royal Court of Jersey to register and publish the said warrants of the said lord high chancellor of Great Britain, and to direct the governor or lieutenant governor, viscount denunciators, officers of justice, constables, and centeniers, and all other her majesty's subjects within the said island, to be aiding and assisting in the due execution of the same warrants, and to order and direct them to be aiding and assisting the said William Henry Allen in taking as well the said Maria Elizabeth Belson and William Henry Hartman as the said infants into his custody, and bringing them before the High Court of Chancery, there to abide such order as the said court should make.

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By an order of the lords of the committee of council for the affairs of Jersey and Guernsey, bearing date the 4th of December, 1849, it was ordered that the petition of appeal of the said Frederick Belson should be referred to the Royal Court of the Island of Jersey for such observations as they might think fit to make thereupon; and, in obedience to this order, the bailiff and jurats of the Royal Court of Jersey submitted to her majesty in council the following explanation of the motives which led them to the adoption of their act of the 21st November, 1849: That the appellant had himself recognized the jurisdiction of the Royal Court by presenting a remonstrance; that, at the time the order of the vice chancellor of England issued, the Royal Court was duly seized of the matters at issue between the appellant and his wife, and the court had made an order in reference to the custody of the two children, who were then within the jurisdiction of the court; that the Royal Court was the only tribunal competent to deal with the matter; and, in support of this, they gave extracts from the charter granted by Queen Elizabeth, which was subsequently confirmed, almost *totidem verbis*, by Charles I., Charles II., and James II.; and that the decision of the Royal Court could only be called in question by an appeal to her majesty in council; that the vice chancellor had not any authority in this case to issue a writ of *habeas corpus*; that the writs which were granted by the vice chancellor were not writs of *habeas corpus ad subjiciendum* at common law, not being issued out of the crown office; that, assuming the writs were writs at common law, they did not run into the Island of Jersey, which is not subject to the common law of England; that the office of vice chancellor was created by an act not extending to Jersey, and therefore the Royal Court had no legal knowledge of it, and his order had no force or validity; that although, by an order of his late majesty King William IV., in council, of the acts of 11th July, 1832, printed copies of the acts of the 31 Car. 2, and 56 Geo. 3, (the *habeas corpus* acts,) were directed to be transmitted to the Royal Court, yet, in consequence of a representation made at the time to his majesty's government, that the registration would be an infringement of the privileges of the island, it was then determined, by the secretary of state, not to press the registration of the said order and act of Parliament, and the same had not accordingly been registered.

The matter now coming on to be heard before the committee, they determined to hear the case made by the Royal Court in the first instance, and called on Sir F. Thesiger and Peacock, who, with Busk, appeared on their behalf, to commence their argument.

Sir F. Thesiger. This is a serious attempt at the invasion of the rights and privileges of the Royal Court of Jersey, and in direct opposition to the order of 1769, by which those rights and privileges were confirmed, as of ancient times. The writ of *habeas corpus* which has been issued is not one which runs into the Island of Jersey at all, and if it did so, it would not properly interfere with the proceedings of a court of competent jurisdiction, before which the matter is now pend-

ing. [The learned counsel then referred to the constitution or charter granted to the island by King John; to the "precepte d'assize," taken before Sir Robert De Norton, knight, and Sir William De la Rue, knight, justices itinerant, A. D. 1331, in the reign of Edward III.; and the letters patent of Queen Elizabeth, to show that the Royal Court of Jersey was of competent jurisdiction to decide the matters before them. He then proceeded as follows:—]

But the writ in this case is not the high prerogative writ of *habeas corpus ad subjiciendum*, (see 2 Inst. 52,) which I do not dispute runs into the Island of Jersey, but is merely the writ *ad faciendum et recipiendum*. There is also the writ of *habeas corpus ad respondendum*, which is issued when a party is in custody in the prison of an inferior court; and also the writ of *habeas corpus ad testificandum*; and there are other writs of a similar description, all of which are judicial and not prerogative writs, and have no more power or extent than the ordinary proceedings of our courts of justice, and consequently would have no force whatever out of the realm. There are three sources only from which the high prerogative writ can issue, viz., at common law, by the stat. 31 Car. 2, c. 2, or by the stat. 56 Geo. 3, c. 100; for I do not rely on the non-registration of the last-mentioned act. But the writ issued in consequence of the vice chancellor of England's order is not a writ issuing in any of these three ways. It clearly did not issue under the two first, and it is almost a matter of history, that, at the time of the debates on the bill which passed into the act of 56 Geo. 3, c. 100, the equity judges were particularly excluded from its operation. *Crowley's Case*, 2 Swanst. 48, 49, shows that the chancellor has the power of issuing the high prerogative writ, but the only mode in which it can be issued is through the petty bag-office, being, as Blackstone expresses it, the *officina justitiæ*. The writs relating to the business of the subject were kept *in hanaperio*, whilst those relating to matters in which the crown was interested were kept *in parva бага*; whence arose the distinction between the hanaper-office and the petty bag-office. [He then referred to *Hutchins v. Player*, Bridgm. 289, in which the distinction between the judicial and prerogative writ is clearly taken.] In all cases where the high prerogative writ issues, the court has no jurisdiction except over the cause of commitment: if the cause is legal, the party is remanded to custody; if illegal, he is discharged: whereas in this case the order is to bring the infants within the jurisdiction of the Court of Chancery, the object being, that, when they are within the jurisdiction, they may be subject to any order the court may think proper to make. It is plain that this will be the effect, for the Court of Chancery has jurisdiction specially over children, as representing the sovereign, who is *parens patriæ*; although common-law courts have somewhat trenched on the jurisdiction of a court of equity, by allowing the children, if of sufficient age, to decide for themselves with which of the parents they will live. The proceedings before a court of chancery were generally taken on petition, and not by issuing a writ. There were very few instances in which such writs had been issued; and Lord Eldon, in the case of *Lyons v. Blenkin*, Jac. 254, was clearly of

opinion, that the proper course was to file a petition. Now, it may be inferred from this, that the writ in question is the common writ which the Court of Chancery is in the habit of issuing, by virtue of the authority given to it over infants, and in exercise of that authority, as a process writ; and it is some evidence of this, that the writ has issued from the office of the clerks of records and writs, instead of out of the petty bag-office, and is sealed with the seal of the clerk of records and writs, and not with the chancery common-law seal. This cannot be a writ issued under the 31 Car. 3, (the *Habeas Corpus* Act.) The only power the Court of Chancery had to issue such a writ was through the common-law office, and in the common-law form; but this was not so issued, and cannot, therefore, run into the Island of Jersey, and has no power or force out of the realm; and there is no contempt in disregarding it. The Court of Jersey are, in fact, called on to assist in the destruction of their own rights and privileges.

[*Lord Langdale*, M. R. One can account for their jealousy in matters which affect the liberty of the subject; but if the Court of Chancery think fit to say, "Make a return to this writ," the Court of Jersey might have found, if they had made such return, that it was never intended to interfere with their rights and privileges.

Lord Campbell. They ought to have presumed, that if the children were in lawful custody, they would be remanded by the vice chancellor.]

But if the children are once taken out of the jurisdiction of the Royal Court, and placed within the jurisdiction of the Court of Chancery here, it would be an effectual bar to the proceedings which had been instituted in the Royal Court of Jersey.

[*Lord Campbell*. I remember a writ to have been issued by the Queen's Bench, where there had been a commitment by the House of Commons; the writ was obeyed, and the Court of Queen's Bench remanded the prisoners. I know, in that case, it was recommended that no return should be made to the writ, but the more wholesome advice prevailed. As the House of Commons trusted their privileges, in that case, to the judgment of the Court of Queen's Bench, it would have been no degradation to the Royal Court of Jersey to have followed their example.]

Peacock, on the same side. The question is not merely, whether the warrant of commitment can be executed in Jersey until it has been registered by the Royal Court, but whether it can be executed even if the Royal Court should so register it. The difference between the writ *ad faciendum et recipiendum*, and the high prerogative writ of *ad subjiciendum*, is shown in 3 Bl. Com. 129, 131, and Bac. Ab. tit. "*Habeas Corpus*." Proceedings are different in the case of infants and adults. *Leg v. Turnbull*, 2 P. Wms. 409. The writ in this case is a writ of *habeas corpus cum causa*. (Veal's Forms of Writs, 50.)

[*Lord Campbell*. I do not see, in substance, how that writ differs from the writ of *habeas corpus ad subjiciendum*.]

The difference consists in the one being a writ of process, from

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which, in case of error in the proceedings, there would have been a rehearing before the lord chancellor, and an appeal to the House of Lords; but can any one say there would have been an appeal if the lord chancellor had issued his *fiat* at once for the great prerogative writ of *habeas corpus ad subjiciendum*? The word *subjiciendum* would be omitted in the writ of *habeas corpus cum causa*. Again, if a man wished to obtain a writ of *habeas corpus ad subjiciendum*, he can only obtain it through the *fiat* of the court or of a judge; whereas the writ of *habeas corpus cum causa* would issue as of course. The writ omits the words *ad subjiciendum*, and must therefore be considered as the minor writ. This was the writ in *Lyons v. Blenkin*. (Seton on Dec. 282.) The issuing of the prerogative writ is not, as in the present case, on matter depending in the High Court of Chancery, which could be heard and determined by the vice chancellor, and upon which an appeal will lie, but is issued by the *fiat* of the lord chancellor alone, and from it there is no appeal. [He then referred to 4 Inst. 78, 79.] The next objection we take is to the seal attached to the present writ, which is only that of the clerk of records and writs. We contend that the great seal of England is the only one which can properly be attached to the high prerogative writ. The clerks of records and writs only derive their powers under the 5 & 6 Vict. c. 103, and certain orders of the 26th of October, 1842, made in pursuance of that act. Under them the power of attaching the seal is only given to the clerks of records and writs, as officers of the court, in relation to suits; but their seal can never be tantamount to the great seal for all purposes. At all events, that order is not in force in Jersey, and how can the people of Jersey be bound by it? But if the writ be not a valid writ, the warrant of commitment cannot be executed, and the present application must be dismissed.

The Solicitor General, contra. I submit that the writ now before your lordships is the high prerogative writ. There is no doubt it was intended to be that writ; for there is no direction in it to bring up any cause, nor is there any pretence that there was a cause to bring up. The present writ is an exact translation of the writ *ad subjiciendum*, with the omission of a few words relating to the caption. The only difference between the writ in Latin and the present writ is, that in the Latin it is *ad subjiciendum et recipiendum*, which, in the present writ, is "to perform and abide." The words *cum causa detentionis sue* are omitted; but as the custody in this case is legal, and there is not an illegal imprisonment, and also that in this case the persons to be produced are infants, I see no reason for the introduction of those words, or that they in any manner affect the validity of the writ. The only writ known to the officers of the court is that which we now have before us. The next question is, whether this writ is defective by reason of its having the seal of the clerk of records and writs, instead of having the great seal, attached to it. It matters not whether it issued from the equity or common-law side. In applications previously to the passing of the 5 & 6 Vict., the writ, when even it issued, went with the great seal attached to it,

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and there was no seal of the petty bag-office. When it was signed by the lord chancellor, the great seal was attached, and the writ issued. Before the 5 & 6 Vict. this writ was always prepared in the six clerks'-office, and then it was brought up to the lord chancellor for signature; and whether he signed it, or whether he affixed the great seal, in his character of a judge sitting in equity or common law, or under any of the various jurisdictions which he exercises, it was immediately effectual and valid. [He then cited *Jenke's Case*, before Lord Nottingham, and referred to Lord Eldon's remarks on that case, 2 Swanst. 12.] It is pretty clear from these authorities, that the writ issued out of term time, which proves that it did not issue from the petty bag-office; but the 4th order of the 26th of October, 1842, which had the force and effect of an act of Parliament, directs that a writ, when sealed by the clerk of the records and writs, shall have the same force and validity as if sealed with the great seal. Whatever, therefore, be the form of the writ, it must thenceforth be presumed to be valid. If they say the writ is void, the proper course would have been to have applied to the Court of Chancery to quash it; they ought to have applied to discharge the writ, or to discharge the warrant of commitment, and that application should have been made to the Court of Chancery, and not to the committee of council. [He also referred to *Re Spence*, 2 Ph. 247.]

W. M. James, on the same side. The argument on the other side is a mere assumption, without any authority of principle or decision, arising from the term "common law," which they attach to the writ; and they say that this writ must have issued, in order to obtain validity, from the common-law side of the Court of Equity. They overlook the fact that the Court of Chancery possesses its jurisdiction only as a common-law court. It is not a court which has acquired jurisdiction in modern times by statute, but was created by the authority of, and is dependent upon, the common law of England; therefore, to say that the writ must issue from chancery, on a particular side of that court, would be like importing a condition, "that when it issues from the Queen's Bench it must necessarily issue from one of the numerous offices which are attached to that court." Lord Eldon has, in the case referred to, practically decided that no difference exists between the equity, or English, and the Latin side of the court. The technical grounds suggested by the counsel on the other side cannot prevail; the only real question is, whether the writ of *habeas corpus* does run into the Island of Jersey, and the decision of that point must determine this case.

Sir F. Thesiger replied.

The lords of the committee, in obedience to her majesty's order of reference, having made their report, her majesty was pleased, on the 5th of February, by and with the advice of her privy council, to make the following order: "That the Royal Court of Jersey do forthwith register and publish the warrants signed and issued by the Right

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Hon. the Lord High Chancellor of Great Britain, bearing date the 13th of November, 1849, addressed to William Allen, tipstaff, &c., directing him to arrest and apprehend Maria Elizabeth Belson and William Henry Hartman; and her majesty was further pleased to order and direct the Lieutenant Governor of the Island of Jersey, the viscount denunciators, officers of justice, constables, and centeniers, and all other her majesty's subjects within the said island, to be aiding and assisting in the due execution of the said warrants."

On a subsequent day, —

The Solicitor General and *James*, on behalf of Frederick Belson, applied for leave to appeal from the order of the 14th of April, 1849.

Busk, on behalf of Mrs. Belson, opposed the application, on the ground that the order was a provisional and not a definitive sentence. The lords of the committee, however, allowed the appeal.

Busk then applied for security for costs; but the lords refused the application, on the ground of Frederick Belson's general liability as husband.

CASES

ARGUED AND DETERMINED

IN THE SEVERAL

COURTS OF CHANCERY;

FROM AND AFTER MICH. TERM, 14 VICT., A. D. 1850.

THE EAST AND WEST INDIA DOCKS AND BIRMINGHAM JUNCTION RAILWAY COMPANY *v.* GATTKÉ.¹

November 30 and December 2, 1850, and February 11, 1851.

Lands Clauses Consolidation Act, 1845, s. 68 — "Injurious affected" *— Compensation — Equity.*

The application of the principle laid down by Lord Cottenham, C., in *The London and North-western Railway Company v. Smith*, 1 Mac. & G. 216; 13 Jur. 417, will not be extended.

A land owner, whose property was not taken, used, or directly interfered with by the railway company, gave the company notice, under the 68th section of the Lands Clauses Consolidation Act, of his claim for compensation by reason of his property being "injuriously affected" by the execution of the works, whereby his goods were damaged by the dust and dirt, and customers were prevented coming to his shop; and required the company either to give a written agreement for payment of the amount claimed, or to issue a precept to the sheriff to summon a jury for settling the compensation. The company filed a bill against the land owner, alleging that the property in question was not "injuriously affected" within the meaning of the 68th section, and praying an injunction to prevent the defendant from proceeding on his notice. Wigram, V. C., granted the injunction, on the authority of the *London and North-western Railway Company v. Smith*: —

Held, dissolving the injunction, that the right to compensation under the 68th section was not confined to damage sustained by persons whose lands are taken, used, or directly interfered with, but extended to consequential damage; that the proper jurisdiction to decide the question of damage, and the *quantum*, was the sheriff's jury; and that there was no equity for this court to interfere.

This was a motion by the defendant to dissolve an *ex parte* injunction granted by Wigram, V. C. The facts of the case are sufficiently stated by the lord chancellor in his judgment.

The Attorney General (Sir J. Romilly) and *Grove*, for the motion. Wigram, V. C., granted this injunction upon the authority of *The London and North-western Railway Company v. Smith*, 1 Mac. & G. 216; s. c., 13 Jur. 417; but we have to submit that that case cannot be supported. But further, we submit, that even if it could be sup-

¹ 15 Jur. 261.

ported, there are circumstances in this case which differ it from that. First, we submit, that the 68th section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, is clear, and points out the precise remedy for the company in case a party claims too much compensation; and that is, that the company may have the question tried by a sheriff's jury. What, then, gives this court power to interfere with the tribunal appointed by the legislature to decide these questions? The company admit that the question must be tried at law, for the bill prays, "that, if necessary, the court might direct an issue." It was evidently the intention of the legislature to prevent powerful companies from oppressing individuals, and for this purpose the old mode by *mandamus* was superseded by the mode pointed out by the 68th section; and the severity of that enactment against the company is no answer to the claim. The injury of which we complain is one for which the claimant is entitled to compensation. *Reg. v. The Eastern Counties Railway Company*, 2 Railw. Cas. 736; 2 Q. B. 347. *Bell v. The Hull and Selby Railway Company*, 6 M. & W. 699. We submit also, that, in point of practice, this was not a case for a special injunction, but ought, if granted at all, to have been the common injunction, the practice being quite different as to common and special injunctions. As to the former, it is granted upon a bill being filed, and no answer put in within a certain time; and then, upon the defendant putting in his answer, he moves, upon his answer alone, to dissolve the injunction; but in a special injunction, the court proceeds upon affidavits.

Wood and Hetherington, contra, in support of the injunction. The case of *Reg. v. The Eastern Counties Railway Company*, *ubi sup.*, turned entirely upon the special words of the act of Parliament. The language of the legislature in the 68th section of the Lands Clauses Act is, if a party shall be "entitled." The meaning of the act is, that all parties clearly *entitled* to compensation shall be enabled to obtain it without a *mandamus*; but the legislature did not intend to extend that right to parties who had no title, or a doubtful one. It is not to be supposed that the legislature intended to throw the construction of this act of Parliament into the hands of a sheriff's jury. The proper course was adopted in *The London and North-western Railway Company v. Smith*, by ordering the title to be tried first by action.

[*Lord Chancellor*. Would such an action as was there directed have laid, unless by the direction of the court, or even then? The answer to that action would have been, "By our not issuing the precept, you got all you wanted under the very terms of the statute." The result would have been that there was no cause of action.]

The judgment of Lord Cottenham in *Smith's Case* has been acted upon in several cases; that is, actions have been commenced for the amount claimed under the act, not in the shape of an action for damages, by reason that the company did not issue their precept for a jury.

[*Lord Chancellor*. I am by no means certain that such an action would try any question whatever. Suppose an action was brought upon a judgment, the defendant could make no defence but that the judgment was fraudulent. The legislature has provided no remedy

or tribunal for these questions but by precept before the jury; if it was intended that these parties should be provided with any other tribunal, it is very odd that one does not find one word about such a remedy; it seems more probable that the legislature intended to leave the whole matter to the jury. It would have been important if you had directed your attention to some of the cases at law, of motions for new trials of jury inquisitions on the ground of including wrong heads of damages.]

We submit, that these questions must always be mixed questions of law and fact; that the jury is the proper tribunal to decide the *quantum* of damage, but not whether damage within the meaning of the act of Parliament has occurred. *Rex v. The London Dock Company*, 5 Ad. & El. 163. *In re Chabot*, 12 Jur. 1023. *The South-western Railway Company v. Coward*, 5 Railw. Cas. 703. An objection of form was taken by the other side, namely, that this ought to have been a common injunction, because it was merely to restrain an action at law; but the injunction is only to restrain them from forcing us to proceed under the act of Parliament. This is not a case, therefore, for a common injunction, no more than it would had there been a warrant of attorney to enter judgment or to stay execution; but it is further made special, upon the ground that we could not try the right in three weeks, and if we did not, the party would be entitled, under the terms of the act, to any amount he might have thought proper to claim.

The Attorney General, in reply. Some confusion is created by the word "entitled," occurring in the statute, being applied to two matters, land and compensation. If the party is entitled to compensation, then he has his remedy under the 68th section; if he is not entitled to compensation, then a *mandamus* will not lie; the intention of the legislature was to put an end to the *mandamus*. The every-day's practice has been, that the sheriff and jury are in the habit of trying questions of title to damages and *quantum* of damage together. Lord Cottenham thought that it was wrong to try the *quantum* of damage before the question of title; but it is very common to enter a verdict for a certain amount, with leave to move to enter a nonsuit. It would be a new head of equity to say this court will interfere to order a question of title to be decided before the *quantum* of damage. The present case stands differently from *Smith's Case*, for here we show distinct injury. *Wilkes v. The Hungerford Market Company*, 2 Bing. N. C. 281. The true question is, what court is to decide the title to compensation.

[*Lord Chancellor*. I understand Mr. Wood to admit, that if the sheriff's jury have the power of deciding the question of title, the equity would fall to the ground.]

Coward's Case, cited by the other side, was very different from *Smith's Case*; they were decided differently by the same judge, (the late vice chancellor of England.)

February 11. LORD CHANCELLOR. This case comes before the court upon a motion to dissolve an injunction, by which the defend-

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ant is restrained from taking any proceeding whatever against the plaintiffs, under or pursuant to his notice, dated the 11th of March, 1850; and in particular from taking any proceeding to compel the plaintiffs to issue their warrant to the sheriff to summon a jury for settling the amount of compensation claimed by him, as in the plaintiff's bill mentioned; and also from bringing any action or taking any proceedings at law against the plaintiffs to recover the sum of 480*l.* 18*s.* 4*d.*, so claimed by him, as in the plaintiffs' bill mentioned, or otherwise in respect of the premises, until the said defendant shall fully answer the plaintiffs' bill, or this court make other order to the contrary. The plaintiffs' company was incorporated by an act of Parliament passed in the ninth and tenth years of her present majesty, and is intituled "An act for making a railway from the East and West India Docks to join the London and Birmingham Railway at the Camden town station, to be called the East and West India Docks and Birmingham Junction Railway;" and it appears, by the statements in the bill, that the company have commenced their works, and are in the course of constructing their railway.

The bill further states, that in September, 1849, the defendant made a claim on the company for the sum of 480*l.*, as a compensation for damage and injury alleged to have been sustained by him in consequence of the dust and dirt occasioned by the company having damaged his goods, and by reason of his customers having been compelled, by the obstruction occasioned by the plaintiffs' works, to quit the side of the road upon which the defendant's shop is situated, before they arrive at his shop, and to cross to the opposite side of the road in order to pass along, by reason whereof, during several weeks, he had sustained a great loss in his trade. The defendant also alleged that he had been injuriously affected and injured by the company having stopped up a passage or lane, along which he was entitled to a right of way, or access to the entrance at the back of his premises. The bill then alleges that no part of the defendant's premises was inserted in the schedule to the special act, and that no part of them had been taken, used, or at all interfered with by the works of the company, and that, therefore, the defendant had no claim to compensation under the provisions of the statutes; and it also alleges, that the several matters complained of by the defendant are wholly false and without foundation, and that they, therefore, declined to comply with his demand.

The bill then states that the defendant had required the company either to enter into a written agreement to pay the amount of his claim, or to issue a precept to the sheriff to summon a jury for settling the compensation; that the company had declined to issue such precept, because the defendant was not a person entitled to compensation, and the issuing a precept would operate as an admission of the title of the defendant to compensation, and that the jury would have no jurisdiction to investigate or decide upon the question of the right of the defendant under the statutes to compensation; but that, by omitting to issue the precept, the defendant would acquire, under the statutes, a right to recover the full amount of his

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claim, with costs, unless this court interfered to restrain him. It further states, that the statutes contain no provision by virtue of which the right or title of the defendant can be legitimately tried and decided, and that such question could not be determined without the aid of this court; and the bill prayed a declaration that the defendant is not entitled to any compensation, and that, if necessary, an issue may be directed to try whether the interest of the defendant has been injuriously affected by the construction and works of the railway; and that the defendant may be restrained from taking any proceedings to compel the plaintiffs to issue their precept to the sheriff, and from taking any proceedings at law to recover the sum claimed by him for compensation. The defendant, in his answer, sets forth his interest in the premises occupied by him, and then states the manner in which the works of the company have injuriously affected his premises in the respects before stated in the claim. The defendant admits, in his answer, that no part of his premises has been taken, used, or directly interfered with by the works of the company, but he contends that they have been injuriously affected within the meaning of the statutes, and, therefore, insists upon his right to compensation. It will be observed, that the case of the plaintiffs rests upon two grounds. It is contended, first, that the act of Parliament imposes no liability on the company to make compensation for damage or injury consequential merely from the works to be constructed, but that compensation is only given in respect of premises actually taken, used, or injuriously affected by an immediate and direct meddling or interference with them, which the answer admits has not been the case in regard to the defendant's premises; and, secondly, it is alleged that the defendant has not in fact sustained any damage whatever from the company's works; and upon these grounds, and especially upon the first, the plaintiffs insist that the defendant ought to be restrained in equity from forcing them to issue a precept, and from commencing any action to recover the amount of his claim by reason of their omitting to do so; and that this court ought to declare that the defendant is not entitled to compensation, or to send the question, under proper directions, to a court of law for decision. Wigram, V. C., granted the injunction as prayed, and his decision appears to have been founded upon principle, and upon the authority of the decision of Lord Cottenham in the case of *The London and North-western Railway Company v. Smith*, 1 Mac. & G. 216; s. c., 13 Jur. 417. The object of the present application is to dissolve that injunction.

The first and most important point to be considered is, whether, upon the correct construction of the stat. 8 Vict. c. 18, the defendant is within the class of persons entitled to compensation; i. e., is he the occupier of lands which have been injuriously affected by the works of the company. The only sections of the act of Parliament that appear to have any particular relation to the question are the 22d and the 68th, which are to the following effect:¹ By sect. 22 of

¹ The 22d and 68th sections are in these words:—

22. "If no agreement be come to between the promoters of the undertaking and the

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stat. 8 Vict. c. 18, it is enacted, that if no agreement shall be come to between the company and the owners of any lands taken or injuriously affected by the execution of the undertaking, or any interest in such lands, as to the value of the lands, or the interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed 50*l.*, the same shall be settled by two justices.

By the 68th section of the same statute, compensation is given in respect of lands, or any interest therein, which shall have been taken for, or injuriously affected by, the excavation of the works. I am not aware that the two sections to which I have referred ever received a special construction; but it appears to me that sections and expressions contained in other acts of Parliament, of the same import as those on which the questions in this case depend, have come in judgment. The rules of construction which have been applied to railway acts, and other acts of the same nature, are, that they are to be liberally expounded in favor of the public, and strictly as against the company. The authorities for these rules are so numerous and well known as to render a particular mention of them unnecessary. The case of *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. 347, arose under an act of Parliament passed in the 6 & 7 Will. 4, c. 106; and Lord Denman remarked, "Before we advert to the provisions of the particular act, we think it not unfit to premise, that where such large powers are intrusted to a company to carry their works through so great an extent of country, with the consent of the owners and occupiers of land through which they are to pass, it is reasonable and

owners of, or parties by this act enabled to sell and convey or release, any lands taken or required for, or injuriously affected by, the execution of the undertaking, or any interest in such lands, as to the value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed 50*l.*, the same shall be settled by two justices."

68. "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, *which shall have been taken for, or injuriously affected by, the execution of the works*, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit: and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of the compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts."

just that any injury to property, which can be shown to arise from the prosecution of those works, should be fairly compensated to the party sustaining it." After these remarks, which I adopt, I think that it is to be presumed that all acts embraced within them have been framed in correspondence with such view, liable to be qualified or rebutted by the contents of the particular act of Parliament to which it is to be applied. The stat. 6 & 7 Will. 4, c. 106, upon which the case of *Reg. v. The Eastern Counties Railway Company* arose, incorporated the company for the purpose of constructing certain extensive lines of railway; and by the 9th section of that statute power is given to the company to take and enter upon lands for the purpose of the railway, and to construct a vast variety of works in detail, and to do all other matters and things necessary and convenient for constructing, altering, and using the railway and other works, and then contains the following words: "The said company making full satisfaction, in manner hereinafter mentioned, to all persons interested in any land which shall be taken, used, or injured, for all damages by them sustained in or by reason of the execution of all or any of the powers hereby granted." Sect. 29 of the same statute contains the directions for trying and determining disputed claims for compensation; and by that section the jury were directed to assess and give a verdict for the sums to be paid for the purchase of the land, and the sum by way of satisfaction for the damages which should before that time have been done or sustained, or by reason of severance of lands; and it then contains these words—"which satisfaction or compensation for such damage or loss shall be inquired into, and assessed separately and distinctly from the value of the land to be taken or used." Compensation was claimed upon the ground that a party was interested in lands injured by reason of the execution of the powers granted by the act; but it appeared that such injury was not caused by any direct interference with the land, but was consequential upon the works of the company. The injury in respect of which compensation was claimed was, that the company had lowered the road adjoining the plaintiff's premises, by which the access was impeded, and additional fences alleged to be rendered necessary. It was contended upon the part of the company, that sects. 9 and 29 ought to be construed in connection, and that the direction in regard to the verdict and its contents showed that the compensation referred to in the 9th section was given only to persons whose lands were taken, used, or directly interfered with, and that consequential damage gave no claim to compensation. It seems to have been scarcely contested that the 9th section, uncontrolled by the 29th section, would have entitled the party to claim compensation. Lord Denman, in giving the judgment of the court, said that sect. 9, in terms, comprehended the case of injury, independently of taking land; and next, that it is assumed "that the satisfaction to be so made, which, if parties could not agree, must refer to the compensation clause, was to extend to all the cases of injury enumerated; one of which was injury to any person, whether his land be taken or not."

The argument urged in that case appears to have been, that as the

jury were specially directed to find matter applicable to land taken, and damage thereupon, it must be intended that the jury were to include compensation for no other matter in their verdict. The court held, however, that, for reasons assigned by Lord Denman, the 29th section did not control or limit the 9th; and that by the 9th section the intention was plain to give compensation to persons whose land was not taken, and who should have sustained consequential injury. Now, the material words of the 9th section of the 6 & 7 Will. 4, c. 106, are, "the said company are to make full satisfaction to all persons interested in any lands which should be taken, used, or injured, for all damages sustained by reason of the execution of the powers granted by the act." Upon comparing these words with the words of the 68th section of the 8 Vict. c. 18, the act of Parliament now under consideration, I think they cannot be distinguished, and that the same construction must apply to both. The question which arises upon the sections which I have compared is the same, and that question is, whether compensation is limited to damage sustained by persons whose lands, or a part of whose lands, are taken, used, or directly interfered with; or does the right to compensation extend to consequential damage?

The judgment of the Court of Queen's Bench was deliberate and considered, and the court acted upon it by directing a peremptory *mandamus* to the company to issue a precept. The 68th section expresses the same meaning, and ought, therefore, to receive the same construction, especially when it is remembered that the judicial construction of the words I have referred to was pronounced in Michaelmas term, 1841, and the section was enacted in the 8 Vict. c. 18, in 1845; and it cannot be reasonably supposed that the framers of the 8 Vict. c. 18, were not aware of that judicial construction, and still less that the framers of the act under which the company was incorporated were ignorant of it, and who, if the compensation to be given were intended to be more restricted than the decision of the Queen's Bench, would doubtless have procured some legislative enactment more distinct and expressive of the intended limitation. The only ground of equity raised by the bill is founded upon the question, whether the 22d and 68th sections entitled any other persons to compensation than those whose lands are taken, used, or directly interfered with, to the exclusion of the right to compensation of all persons whose lands are not so affected. But, as I before stated, I think the judgment of the Court of Queen's Bench a satisfactory answer to that question, and that the only ground of equity fails; and that the injunction ought, therefore, to be dissolved. It was strongly argued on the part of the plaintiffs, that the case of *The London and North-western Railway Company v. Smith* governed the present case, and that the injunction in this case cannot be dissolved without overruling that decision.

If the question in this case was the same as that determined in the case referred to, I should yield to its authority, because I do not think it would be proper for me to overrule a former recent judgment of this court, as such a course of proceeding would introduce great uncertainty in the law of the court. I may, however, state, that I

should not deem it right to extend the application of the principle of that decision; I, therefore, disclaim the intention to overrule that decision. I, however, think this case distinguishable from the case of *The London and North-western Railway Company v. Smith*, upon the grounds I will state. In the case of *The London and North-western Railway Company v. Smith*, compensation was claimed solely upon the ground of the injurious effect resulting from the permanent stoppage of what, at the time of the company's acts complained of, was a public highway, no damage or injury being sustained by the claimant, but what in a greater or less degree applied to all the queen's subjects.

The only question, therefore, was a question of law, and which seems to approximate very nearly to the question decided in the case of *Reg. v. The Bristol Dock Company*, 12 East, 429, in which compensation was claimed by certain brewers, who were in the habit of using the water of the river Avon for the purpose of brewing, and the works constructed by the dock company had rendered the water unfit for that purpose; but the court held, that, as no such appropriation of the water had taken place as to give the claimant more right to compensation than any other individual of the public who had been in the habit of dipping water from the river, the complaint was that of a public nuisance, for which an indictment might be maintained if the legislature had not authorized the nuisance. In that case the injury complained of was common, as was also the case in *The London and North-western Railway Company v. Smith*; and it might reasonably be contended that the case of *Reg. v. The Bristol Dock Company* was a direct decision against the claim. In this case the claim is personal and individual, and is supported by a distinct decision of the Court of Queen's Bench; and upon the authority of that case I think the defendant is entitled to have his compensation assessed by a jury, and, therefore, that the injunction ought to be dissolved. The application of the principle of the case of *The London and North-western Railway Company v. Smith* to this and similar cases would operate very hardly upon the claimant, and would, I think, defeat an intention clearly entertained by the legislature — that of giving a summary remedy for the assessing and recovery of compensation; and if experiments like the present were successful, claimants, whose compensation should not exceed 200*l.* or 300*l.*, would be utterly deprived of their compensation by the costs necessarily incident to such a course of proceeding. Prior to those acts of Parliament which are incorporated into all special railway acts, the party's remedy to compel companies to issue precepts was by *mandamus*, upon the return to which writ the right of compensation, if disputed, was discussed and decided.

The use which had been made of that course of proceeding was found to be dilatory, oppressive, and expensive, and the legislature has sought a remedy by subjecting the railway companies to a more summary and stringent power, and for that purpose has enacted, that if a party claiming compensation required the company to issue a precept, they should be compellable to do so at their peril,

should the party be found ultimately entitled, of being liable to pay the full amount of the claim. This proceeding has nothing anomalous in its principle, because it is incident to every common-law complaint of injury and damage, that the existence of the injury, right to compensation, and the amount of the damage alleged to have been sustained, are tried and decided in one proceeding and upon one trial. The requisition of a precept in this case was analogous to the commencement of an action, and upon execution of the inquisition it was competent to the tribunal to decide upon the question, whether any injury within the meaning of the act had been inflicted by the company, and whether any damage had been sustained in consequence. The course prescribed excluding all inquiry upon either of these points prior to the execution of the inquisition, it seems to have been doubted whether by issuing the precept the company would not be taken to admit the existence of a right to some compensation, but I cannot see any ground for that conclusion. If the legislature has made it the duty of the company to issue the precept upon being required to do so, at the serious peril of paying the full amount of the claim in the event of the claimant being found entitled, the performance of that imperative duty cannot operate as any admission on the part of the company.

After the compensation jury shall have decided that the claimant has sustained a damage for which he was entitled to recover compensation, the claimant has to enforce payment. Formerly the proceeding for that purpose was by *mandamus*, and if the jury had no jurisdiction to decide upon the right, it follows that the question of right might be raised by a return to the *mandamus*; but since the decisions of *Corrigal v. The London and Blackwall Railway Company*, 5 Man. & G. 219, and *Williams v. Jones*, 13 M. & W. 628, it seems that the remedy of the claimant is by action upon the judgment; and the pleadings in *Corrigal v. The London and Blackwall Railway Company*, in such an action, show that the right might be wholly disputed, supposing, as before stated, a compensation jury had no jurisdiction to decide the question. The argument founded upon the supposed admission on the part of the company therefore fails. It has also been assumed in the argument, that the compensation jury have no jurisdiction to decide upon the question of right; but during the many years that compensation has been assessed — that is, ever since the passing of the London and West India Dock Acts, fifty years ago — questions upon the construction of the compensation clauses have constantly arisen before the recorder of London and other presiding officers, and of necessity they have been decided by him and the jury; such questions of construction have incidentally and directly arisen, and been decided; and of necessity, for they cannot be anticipated. The jurisdiction of the jury has been frequently recognized. In the case of *Reg. v. The Lancaster and Preston Railway Company*, 6 Q. B. 759, the jury found, that the claimant had sustained no damage; and upon application for a *mandamus* to compel the company to issue a new precept, the court refused to do so, and thereby upheld the inquisition. Lord Denman,

C. J., in giving judgment, said, speaking of the duty of the jury, "They are to inquire and assess the damages; and even if the counsel be right in his argument that the issuing of a warrant admits of some damage, that admission cannot bind the jury. The question, whether any damage has been sustained or not, is inseparable from the question, how much damage has been sustained." "The words in the warrant, therefore, though it would have been better if they had been omitted, do not alter the duty of the jury, and all parties are bound by this verdict; and if the proceedings show on their face a defect of jurisdiction, a *certiorari* is not wanted." And Coleridge, J., said, "The only questions are as to the form of the warrant and the conduct of the jury. The words, 'if any,' though it would be better if they were away, do not affect the validity of the warrant; for though the inquiry may go only to the *quantum*, that *quantum* may be nothing. Then the jury cannot be expected to give a farthing; strictly speaking, such a finding, if there were no damages, would be a violation of their oath as much as the finding of a large sum;" in which opinion Patteson and Wightman, JJ., concurred. In the case of *Reg. v. The Eastern Counties Railway Company*, 3 Railw. Cas. 466, the claimant had tendered evidence under a certain head of claim. The under sheriff rejected the evidence, upon the ground that, by the act, the compensation jury had no jurisdiction to assess compensation for that head of damage; and upon a motion for a *mandamus* for a new precept, it was refused upon the ground that it was, in effect, an attempt in another form to review the decision by a new trial, which the party could not do. In *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. 347, it was also objected, that evidence had been improperly received of deterioration in the value of the property by the construction of the works; and the court said, that such evidence was receivable to show jurisdiction; plainly importing that the question of jurisdiction was within the province of the presiding officer and jury upon the execution of the inquisition. The assumption, therefore, that the presiding officer and jury have no jurisdiction to construe the act upon the point, whether the claim made is within its provisions, is founded in mistake. But it is said that the tribunal is not such as is competent to discharge the duty of deciding questions of law and construction; but the question is, Has the statute given them the power? If it has, a question arises as to the competency of any court to withdraw power and jurisdiction from it. The supposed inconvenient course was prescribed in preference to the delay and expense of a *mandamus*. But what is the course which this court is asked to substitute for the statutable course? It is to subject the claimant (however small the claim may be) to a suit in chancery, in which the question involved is admitted to be a question of law, which the court ought not to decide, and for this court to send the party to a court of law for decision by an action. The proceedings of this court are liable to appeal to the House of Lords, when, if the party succeeds in his appeal, he gets no costs. The action is subject to a bill of exceptions, to a writ of error to the Exchequer Chamber, and to the House of Lords. The delay by such a course

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of proceeding cannot be predicted; and if in the result the case be determined in favor of the claimant, he has then to commence the prosecution of his compensation; and all this is brought upon the claimant by an attempt on the part of the legislature to protect him from delay and expense. The means of companies to prosecute litigation are not to be compared to those of the claimant. His interest is expedition, that of the company delay. For a claimant of moderate amount to enter into this conflict with a company must be most ruinous and unwise; and the company, by making an example of one claimant, will unquestionably succeed in deterring many others from advancing their claims. It is also to be observed, that if the statutable course is inconvenient, or open to whatever objections, as bearing hard upon the company, the company are much more responsible for the inconvenience than the claimant, as the company had the opportunity of satisfying the legislature if it acted unjustly towards them, and of suggesting a more just course. In this case, as I see no reasonable doubt, that if the defendant has in fact sustained damage from the causes alleged, he is a person entitled to claim compensation, and that he is entitled to have the question submitted to a jury; the injunction must, therefore, be dissolved, with costs.

CHAPMAN v. CHAPMAN.¹

March 21, 1851.

Equitable Mortgage — Creditor's Suit.

Possession of title deeds by a bond creditor is not of itself sufficient evidence of a deposit by way of equitable mortgage.

Where the plaintiff failed to prove his right to an equitable mortgage, the court refused to direct a reference to the master for further inquiry.

A bond creditor not having prayed an account of the testator's real estates in a suit for payment of his debt, he was held not entitled to such relief under the prayer for general relief.

THE bill in this case stated, that in the month of February, 1827, Robert Chapman, deceased, was seized in fee of a farm called "Hayes Hill farm;" and that he, in the same month, applied to the plaintiff, James Chapman, for a loan of 1900*l.*, and proposed to secure the repayment thereof, with interest at 5*l.* per cent., by executing and giving to the plaintiff his bond, and also by delivering to and depositing with the plaintiff the title deeds of the said farm, to be held by the plaintiff as a security by way of equitable mortgage, by deposit of the said deeds; and that the plaintiff agreed to the proposal, and in pursuance thereof, on the 27th February, 1827, he lent and advanced the sum of 1900*l.* to the said Robert Chapman; and thereupon, and

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for securing the repayment of the said sum of 1900*l.* and interest, the said Robert Chapman delivered the title deeds of and relating to the said farm, to be held by the plaintiff, and accordingly the same had ever since remained and were then in the plaintiff's possession as such equitable mortgagee; that the said Robert Chapman also gave his bond, of the same date, to the plaintiff, to secure the said sum of 1900*l.* and interest: that at the time of the delivery of the title deeds to the plaintiff, no memorandum of the deposit of the deeds was executed by Robert Chapman. The bill then stated three several promissory notes for 150*l.*, 130*l.*, and 120*l.* respectively, alleged to have been given by the said Robert Chapman for arrears of interest on the said bond debt. It also stated the death of Robert Chapman, and his will, devising the Hayes Hill farm, and appointing certain persons his executors, and alleging that the said 1900*l.* and the several sums secured by the promissory notes were still due. The bill, which was filed against the persons interested under the testator's will in the Hayes Hill farm, and his executors, prayed that an account might be taken of what was due to the plaintiff for principal and interest on the said sum of 1900*l.*, and the said three several sums of 150*l.*, 130*l.*, and 120*l.*; and that the said three last-mentioned sums might be declared to be a charge on this estate, called "Hayes Hill farm," as being a part of the said interest on the said sum of 1900*l.*; and that the defendants and all other necessary parties might be decreed to execute to the plaintiff a sufficient legal conveyance in fee from incumbrances, of the Hayes Hill farm, by way of mortgage, for securing the amount of the said principal sum of 1900*l.*, and the amount which should be found already due for interest thereon, and the future interest, or that otherwise the said hereditaments and premises might be sold, and that the proceeds of such sale might be applied in payment of the said sum of 1900*l.* and interest, so far as the same would extend; and that an account might be taken of what was owing to the plaintiff in respect of the debts secured by the promissory notes, and interest thereon; and that the defendants, the executors, might admit assets for the payment of the said last-mentioned debts, and also of so much of the said debt of 1900*l.* as should not be realized from the said premises, or that otherwise the defendants, or some or one of them, might pay to the plaintiff, within a time to be appointed by the court, the amount of the said principal sum of 1900*l.* and interest, the plaintiff thereby offering upon such payment to deliver up the title deeds so deposited with him; and in case the executors should not admit assets, that an account might be taken of the testator's personal estate and of his other debts, and his personal estate applied in a due course of administration, including the plaintiff's debt, or so much thereof as should not be realized out of the said premises; and that the decree to be made at the hearing of the cause might be a decree for the benefit of all the creditors of the testator. The bill did not contain allegations that the testator had other real estates besides the Hayes Hill farm, nor did it seek to have an account of his real estates, and the same applied for the payment of debts; but as to real estate, it sought only to establish a lien or equitable

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mortgage on the Hayes Hill farm. The bond debt was proved, and it was admitted by the defendants that the plaintiff had the title deeds of the Hayes Hill farm in his possession, and it was not alleged that he had got possession of them unfairly; but an agreement by the testator to give the plaintiff an equitable mortgage on the farm was not admitted, and there was no evidence of any such agreement, or of the time at or circumstances under which the deeds came into the possession of the plaintiff.

R. Palmer and *Bagshawe* appeared for the plaintiff, and contended that the possession of the deeds by the plaintiff, coupled with proof of the bond debt, was sufficient to entitle him to an equitable mortgage on the Hayes Hill farm; or, if it was necessary to have further evidence as to the circumstances under which the plaintiff became possessed of the deeds, an inquiry before the master might be directed; or, if the court should be of opinion that the mortgage was not established, and that there ought to be no further inquiry, the plaintiff was entitled under the general prayer to have a general account taken of the testator's real estates, and to have the same sold, and the proceeds applied in aid of the personal estate in payment of the testator's debts, including the plaintiff's debt.

Turner, *Roupell*, *Chandless*, and *Haldane* appeared for parties interested under the testator's will in the Hayes Hill farm, and contended that the agreement for an equitable mortgage was not proved, and that the plaintiff having failed to prove his case, it was contrary to the established practice to direct a reference to the master for further inquiry; and that the plaintiff was not entitled to have an account of the testator's real estates, as there was no allegation or prayer in the bill to support that relief, and the persons interested in the testator's real estates, other than the Hayes Hill farm, were not before the court.

Kenyon Parker and *Goodeve* were for the executors.

The following cases were cited: *Holden v. Hearn*, 1 Beav. 445. *Marten v. Wichelo*, 1 Cr. & Ph. 260. *Ex parte Langston*, 17 Ves. 227.

LORD LANGDALE, M. R., said, that he was clearly of opinion that the production of the title deeds from the possession of the bond creditor was not of itself sufficient evidence of a deposit by way of equitable mortgage. He thought there could not be a reference to the master for further evidence; and he dismissed the bill so far as it sought to establish an equitable mortgage, but he did so without prejudice to the plaintiff filing another bill. He did not think that the plaintiff was entitled to a general account of the testator's real estates, in the absence of any allegation in the bill to support such a decree. But he made the usual decree against the testator's executors for an account of his personal estate.

The Attorney General v. Lord Carrington.

THE ATTORNEY GENERAL v. LORD CARRINGTON.¹

March 8, 1851.

Affidavit Evidence — Depositions on Interrogatories — Cross Examination.

Opinion of the court on the relative value of evidence given by affidavit and by depositions taken on written interrogatories, and on the use of cross examination.

In this case a petition was presented by the vicar of the parish of H., in the county of L., praying a declaration of the court, that as such he was entitled to be the head master of the grammar school at H., and a declaration that the Rev. Mr. P. had not been duly elected to that office by a majority of the trustees. At the hearing of the petition, in May, 1850, a declaration was made, that the Rev. Mr. P. had not been duly elected. Affidavits were made by some of the trustees, six in number, who were respondents, and who had elected the Rev. Mr. P., and by many other persons, in opposition to the petition; and some, but not all, of these affidavits were read. Such as were read, however, were entered in the order. The Bishop of L., one of the trustees, appeared by the same solicitor and counsel as the six trustees, but neither he nor the patron of the living of H., nor one other of the trustees, took any ostensibly active part in the litigation. The order of May, 1850, contained leave to the respondents to show cause why the petitioner should not be declared entitled to the head mastership of the school. Pursuant to this, affidavits were filed on both sides, and, by agreement, the affidavits filed before May, 1850, were read at the hearing, which took place in the private room of the judge, on the 12th, 13th, and 14th of February, when judgment was finally given in favor of the petitioner. In delivering his judgment, which was read in open court, his honor made the following observations on the relative value of evidence given by affidavit, and that by depositions taken on written interrogatories, and upon the use of cross examination, in equity.

Roundell Palmer and Cotton, for the petitioner.

Russell and Faber, for the trustees.

G. Lake Russell, for the displaced master.

Knight Bruce, V. C. The testimony consists of affidavits, with the addition of a few exhibits. The affidavits comprise some, though not many, made by parties to the contest, a designation under which I do not, at present, include those persons, if any, who, though parties in substance, are not so in form. How far, or in what sense, if at all, those affidavits ought to be treated as evidence, may possibly be ques-

¹ 15 Jur. 266.

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tioned; but they have been read without objection as part of the case, and such of them as have not been entered in the order of May last must, I suppose, be entered in the order now to be made — all, perhaps, previous to the order of May being entered in it. When a question of fact is tried upon affidavits, it is often used as an argument against a party to the contest, that he has not denied by affidavits an alleged fact, asserted either positively or as to information and belief against him in an affidavit. I have, in fact, frequently known statements of parties positively made, and either uncontradicted or not credibly contradicted, and statements as to information and belief not contradicted, to be, when contained in affidavits where a case was on trial in the court of chancery upon affidavits, evidence attended to and acted upon, and this by very considerable judges. It has happened, too, that an affidavit has been treated by the court in some sort as an answer; and it occurs occasionally that one of the parties to a dispute makes such an affidavit, or so deals with an affidavit made by his adversary, as to render the latter, of necessity, evidence in every sense for, as well as against, the deponent.

Again: there are instances in which the court requires affidavits from parties and claimants, not as evidence, but as tests of good faith; with reference to which remark I may notice an argument used by the counsel of the present petitioner, which was founded upon the allegation, whether accurate or inaccurate, that neither of the six trustees deposes to his knowledge or belief that the petitioner is, or has been, guilty of any part of the offences or improprieties laid to his charge. If this is a correct construction of the language of the affidavits, the argument may perhaps not be wholly without weight. In the view, however, that I take of the case, it is immaterial for what purpose or purposes the affidavits of the parties to this contest, or any one or more of them, ought to be considered as admissible or read. I proceed to notice, that, with regard to the whole body of affidavits, it has been suggested at the bar, on one side at least, that this mode of trying disputed matters of fact, of the nature involved in the present controversy, is inconvenient and unsatisfactory — a suggestion upon which it is perhaps sufficient to refer to the agreement embodied in the order of last May. I am, however, far from acceding to the opinion, that universally, or even necessarily, depositions upon interrogatories are preferable to affidavits for the purpose of trying questions of fact, whether simple or complicated. And as to proof *viva voce*, although that is often useful, and sometimes indispensable, the present instance is not, in my opinion, a case for a jury. It appears to me, that, considering what the issues here raised are, an examination before a jury would be not advantageous to justice, but probably very much the reverse. A cross examination at law is sometimes, in skilful, but often in unskilful hands, a weapon that recoils on him who uses it, nor is it very seldom an instrument of injustice. But in equity it is something that, sitting here, I would rather not characterize — something with which we are perhaps too familiar to appreciate it duly. Considering that here the party cross examining knows neither the answers that have been given by the witness, nor the questions that have been

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addressed to him in chief, it ought not to excite much surprise that in equity it is generally of no use whatever.

Again: interrogatories, that is, especially in chief, are expressed in legal *patois*, such as to be scarcely, or not without difficulty, intelligible to unprofessional witnesses, who, without a careful explanation, must, I am sure, be often bewildered and confounded by the uncouth phraseology addressed to them. I have heard it said, that witnesses in chief are sometimes facilitated in this respect, by carrying with them to the examiner's office, or before the commissioner, a prepared statement of the evidence. Whether that is often allowed I cannot say; but I know, where it is done, the deposition becomes in effect an affidavit, and where it is not done, (as I suppose generally it is not,) the distinction appears to me but slight. It is true, that a witness cannot be compelled to make an affidavit, but I have seldom or never known any injustice or inconvenience arise practically from those circumstances; where there is a refusal, there are generally found means of supplying or neutralizing the defect, by the affidavits of persons willing to depose, for there is practically less strictness in affidavit evidence, and a greater facility of adding to it, than in the case of depositions upon interrogatory. The system regulating the rules connected with what we call publication has often seemed to me, at least, to effect as much injustice as justice. Nor in the present instance do I believe that the case of the accusers or of the accused has suffered from wanting the means of cross examination, or from any refusal that has taken place to make affidavits.

Finally, if the system of affidavits is bad, it ought not to be allowed to prevail in so many instances as it does, questions of importance being continually decided in that way at common law, in equity, in bankruptcy, and in cases, if I mistake not, at Doctors' Commons. The affidavits of persons who either are not in any sense, or are not in a legal and technical sense, parties to the contest, are, as I have intimated, very numerous, exceeding, unless I miscalculate, two hundred, made, unless again I mistake, by more than one hundred and forty persons; the great bulk being, as I have said, after the order of last May, and therefore addressed with more or less directness to the main points of the petitioner's fitness or unfitness.

HILLS v. TREACHER.¹

February 20, 1851.

Short Claim — Setting down — Costs.

This had been set down as a short claim on the certificate of the plaintiff's counsel.

Zulueta v. Vincent.

Bethell and *Craig*, for the claim.

Toller (*Roll* absent) objected that the certificate ought to have been signed by the counsel on both sides. That was the practice in the court of the vice chancellor of England, to whom his lordship had succeeded. *Ker v. Cusac*, 7 Sim. 520.

LORD CRANWORTH, V. C. I have inquired, and I find that the practice of Knight Bruce, V. C., which seemed very convenient, is, that upon the certificate of one counsel it is to be set down as a short claim, and if, when it comes on, the judge is not satisfied that it is short, the party setting it down pays the costs of the day; and I have adopted that practice.

The cause was then opened, and proceeded to a considerable length. After some time, his honor observed, that though the counsel for the plaintiff might be of opinion that the cause was short, yet if the counsel for the defendant took a different view of the suit, and came prepared with authorities to support his view, it was clear that the cause would not be short. This led his honor to doubt as to the convenience of the rule he had adopted as to the signature of one counsel alone.

Claim to go into the general paper; plaintiff to pay costs of the day.

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March 1 and 12, 1851.

Amendment — Appearance — Practice.

Appearance for a defendant resident abroad ordered under the 29th order of the 8th of May, 1845, where the solicitor, who appeared for him to the original bill, had been served with a *subpoena* to appear to an amended bill under the 26th order.

STUART applied *ex parte* for an order to enter an appearance for the defendant Vincent to the amended bill, pursuant to the 29th order of the 8th of May, 1845. The defendant was resident in the Island of Cuba, and the solicitor, who appeared for him to the original bill, had been served with a *subpoena* to appear to the amended bill, under the 26th order of the 8th of May, 1845. The application had been previously made to the master of the rolls, but his lordship having been informed that similar applications had been refused in *The Marquis of Hertford v. Suisse*, 13 Sim. 489, and *Sewell v. Godden*, 1 De G. & S. 126, and by Lord Cottenham, on appeal, in *Sewell v. Godden*, on the 14th of March, 1849, (not reported,) he declined to make the order, although he said he was of opinion it ought to

¹ 15 Jur. 284.

DRIOLI v. Sedgwick.

be granted, as the defendant, although not resident, was, according to the practice of the court, within its jurisdiction, by having appeared to the original bill, and thereby submitted to and brought himself within the jurisdiction.

The LORD CHANCELLOR stated that he would communicate with the master of the rolls upon the point.

March 12, 1851. The LORD CHANCELLOR stated, that having communicated with his lordship, the master of the rolls, and having considered the point, he was of opinion that the master of the rolls' view of the practice was correct, and made the order.

DRIOLI v. SEDGWICK.¹

February 25, 1851.

Dismissal.

A bill, as amended, was against a former defendant, S., from whom no further answer was required, and three new defendants. The three new defendants filed their answer, and required security for costs. Nothing further was done for eight months, when the plaintiff proposed two sureties. A week afterwards the defendant S. moved to have the bill dismissed, and the bill was accordingly dismissed as against him.

THE bill in this case was filed on the 25th of July, 1848, to restrain two defendants, R. Sedgwick and L. W. Sedgwick, from selling a certain *liqueur*, and the injunction was obtained accordingly. The defendants put in their answer. On the 9th of April, 1850, the plaintiff amended his bill, and, as amended, it was against R. Sedgwick and three new defendants, Pearse, Hanson, and Murphy. These defendants were required to answer all the interrogatories, no further answer being required from Sedgwick. The new defendants put in their appearance on the 13th of April, and on the same day procured and served an order, requiring the plaintiff, who lived at Zara, in Dalmatia, to give security for costs; after which nothing further appeared to have been done till the 9th of December, when the plaintiff's solicitors wrote to propose two persons as securities; and on the 16th of December, R. Sedgwick gave notice of motion to dismiss.

Roll and Speed, in support of the motion.

Karslake (*Bethell* with him, absent) opposed, and read an affidavit that the plaintiff's solicitors were in correspondence with him, and contended that the delay was on account of the distance at which he resided. He also read affidavits that the plaintiff had had diffi-

¹ 15 Jur. 284.

Drioli v. Sedgwick.

culty in discovering who were the partners in Sedgwick's firm, and asked for leave to amend.

LORD CRANWORTH, V. C. By the 16th order of May, 1845, sect. 39, where the plaintiff amends his bill without requiring an answer to the amendments, and no answer is put in thereto, and no warrant for further time to answer the same is served within eight days after service of the notice of the amendment of such bill, the plaintiff is, after the expiration of such eight days, but within fourteen days from the time of such service, either to file his replication, or to set down the cause to be heard upon bill and answer, otherwise any defendant may move to dismiss the bill for want of prosecution. Now, here, the bill was amended on the 9th of April, 1850; therefore on the 23d the defendant was entitled to move to dismiss for want of prosecution, unless a replication was filed, or the cause set down on bill and answer — that is for the sake of the defendant; and is that order to be enforced or not? It would be trifling with the orders of the court, if merely for the asking the parties are to have leave without assigning any reason. With the observations of Lord Langdale, M. R., I entirely coincide, with the exception of one single passage — “What is a judge to do when the defendant says, ‘The cases work great injustice on me?’” I think the preliminary inquiry will be, Has the plaintiff done all in his power? And if it appears that he has done so, then arises a question of the balance of inconvenience. The plaintiff has given the defendant a right to move, but the court is not bound thereupon to dismiss the bill. I consider it preliminary on the part of the plaintiff to show that he has done all in his power. Now, here, not only is there nothing to convince me that he has done so, but every thing to show that he has not. He has amended the bill, and made some new defendants, and these new defendants require security for costs. Now, if the plaintiff had shown, that, on receiving that notice, he had taken steps to get security, I should not have been very nice to inquire whether he had actually lost no time whatever, but should have asked if he had made any *bona fide* attempt, and then, though it was right for the defendant to ask to have the bill dismissed, yet I should not have granted it at once. But here are no affidavits at all as to what he has done for full eight months; afterwards, indeed, he proposed certain persons as securities. I must confess there are great complaints made as to the delays of the Court of Chancery, and they certainly would not be without foundation if I were to listen to such an application as this. I can make but one order, and that is, to dismiss this bill for want of prosecution.

Goodall v. Little.

GOODALL v. LITTLE.¹

December 7, 1850, and January 11, 1851.

Production of Documents — Privileged Communications — Letters between Co-Defendants.

The plaintiffs, who were assignees of a bankrupt firm at Teneriffe, filed their bill against the defendants, three brothers, one of whom managed the business of the Teneriffe firm, for an account of certain remittances forwarded by the manager of the Teneriffe firm to his brother, as agent in London. The defendant, the London agent, set up as a defence certain proceedings in the Lord Mayor's Court, instituted by the third defendant as executor of his father, under which the money in the hands of the agent of the Teneriffe firm was attached for a debt alleged to be due to the estate of the father. Upon motion for production of documents, it was held, that letters which had passed between the London agent and his solicitors with reference to the litigation in this suit were privileged; that letters which had passed between such solicitors and the attorney acting in the proceedings in the Lord Mayor's Court were also privileged; but that the letters from the defendant, the manager of the Teneriffe firm, to the co-defendant, the agent in London, for the purpose of being communicated to his solicitors, with a view to the litigation in this suit, were not privileged.

THIS was a motion that the defendants, William Little and Archibald Little, might be ordered to produce the several books, papers, letters, documents and writings, with the exception of the several letters or writings, bearing date and written after the 13th of October, 1849, (the day on which the bill was filed,) admitted by the answer of the defendants to be in their possession, and contained in the second schedule thereto.

The bill was filed by Don Andres Goodall and Don Pedro de Poute against William Little and Archibald Little, and James Little, (when he should come within the jurisdiction of the court,) and it stated that previously to the month of October, 1847, William and James Little carried on business as merchants at Teneriffe under the style or firm of Messrs. Pasley, Little, & Co., such business being carried on in Teneriffe on behalf of the said firm by James Little as the partner resident in that island; that, on the 6th of November, 1847, the said firm suspended payment, and that a meeting of the creditors was convened at Teneriffe, and it was then agreed that the firm should be allowed to carry on business, and to make consignments and remittances to a correspondent in London as an agent, so as to enable them to meet the claims of their creditors; that in pursuance of such agreement, divers shipments were made and consigned to William Little as the London agent, and divers bills of exchange were also remitted to London, which were drawn upon persons in London and elsewhere, the amount thereof to be remitted to the firm at Teneriffe; that the whole amount of such consignments was 4566*l.* 4*s.* 7*d.*, which was carried to the *debit* of the separate account of the said William Little in the books of the firm of Pasley, Little, & Co.; that, on the 4th of March, 1848, the said firm were duly declared bankrupts according to the laws of Teneriffe, and assignees were appointed; and that by virtue of such appointment, all

¹ 20 Law J. Rep. (N. S.) Chanc. 132. 15 Jur. 309.

Goodall v. Little.

the estate and effects of the bankrupts became absolutely vested in the assignees to be realized for the benefit of the creditors; that, on the 10th of May, 1848, the assignees drew two bills of exchange for the sum of 1300*l.* each against the amount due to the bankrupt's firm, addressed to William Little of London; that the said bills were duly presented to the said W. Little, who refused to accept them, and they were accordingly protested, and no part of the amount was ever paid, but still remained due and owing by him; that, on the 7th of June, 1848, the assignees first appointed retired from their office, and the plaintiffs were appointed in their place.

The bill charged that the said sum of 4566*l.* 4*s.* 7*d.*, together with interest thereon, and other moneys, amounting in the whole to a considerable sum of money, was still due and owing to the plaintiffs, as such assignees, from the said W. Little; but that the said W. Little pretended that there was a large sum of money due from the said bankrupt firm to the estate of his late father, A. Little, deceased, amounting to more than the sum due from him, the said W. Little, to the estate of the bankrupt firm; and that he, the said W. Little, as one of the executors of his late father, was entitled to retain the amount due from him to the plaintiffs, against or in satisfaction or reduction of the debt alleged to be due from the estate of the said bankrupt firm to the estate of his said late father; and the defendant also pretended that certain proceedings in foreign attachment had been instituted in the Lord Mayor's Court by the said W. Little, and by A. Little and J. Little, as executors of the said A. Little, deceased, against him, the said W. Little, as garnishee, and having money in his hands belonging to the said bankrupt firm liable to be attached by the said executors for the aforesaid debt due to the estate of the said A. Little, deceased; and against him, the said W. Little, and J. Little, as the partners trading under the said firm of Pasley, Little, & Co., and that under and by virtue of such proceedings in the aforesaid court the sum of 4500*l.* had been attached in the hands of him the said W. Little, and that a judgment had been obtained in the said proceedings and execution issued in July, 1848, and that in consequence thereof the defendant was unable to pay the plaintiffs the amount due to them as such assignees.

The bill charged that these proceedings in the Lord Mayor's Court were not instituted *bona fide*, but were merely colorable proceedings for the purpose of enabling the said W. Little to retain in his hands the balances due from him to the estate of the said bankrupt firm; that such balances were still due and owing, and ought to be paid to the plaintiffs by the said W. Little.

The bill also charged that the defendants, or some of them, had in their possession, or in the possession of their solicitors or agents, divers accounts, books of account, bills of lading, bills of exchange, receipts, vouchers, memoranda, letters of advice, and other letters, and also documents and writings relating to the matters aforesaid, by which the truth thereof would appear, and that they ought to produce the same, but which they refused to do.

The bill prayed that an account might be taken of the several

consignments and remittances made by or on account of the firm of Pasley, Little, & Co. to W. Little, as such agent as aforesaid, and of the proceeds of the sale of such consignments and of all dealings and transactions consequent upon such consignments and remittances; and that the said W. Little might be decreed to pay what should be found due from him, in order that the same might be applied by the plaintiffs in a due course of administration for the benefit of the creditors of the firm of Pasley, Little, & Co., and the bill prayed an injunction to restrain the defendants from taking any steps to enforce the execution of the judgment obtained in the court of the lord mayor of London for the sum of 4500*l.*, and that they might be restrained from parting with the said sum or any other sum due to the plaintiffs, except under the direction of this court, and that they might be ordered to pay the said sum into court.

The defendants, William Little, and Archibald Little, one of the executors of Archibald Little, deceased, by their answer, set up as their defence to the bill the proceedings in the Lord Mayor's Court, which they alleged to have been *bona fide*, and the judgment obtained therein, and the defendants denied the title of the plaintiffs to be such assignees, as alleged, of the bankrupt firm, according to the laws of Tenerife. The defendants stated that these proceedings in the Lord Mayor's Court were instituted by Archibald Little, in the names of the executors of his father, Archibald Little, deceased, against the firm of Pasley, Little, & Co., and that judgment was *bona fide* recovered therein against the defendants, and that such proceedings were carried on for the plaintiffs in the suit by George Ashley, as the attorney and agent of the defendant Archibald Little, and instructed by him, and, as was usual, neither the defendants nor any attorney or agent for the defendants intervened on the said proceedings. The defendants admitted the possession of the letters mentioned in the schedule to their answer; but submitted that they ought not to be ordered to produce them, inasmuch as they were all letters written either pending or in contemplation of the litigation of this suit and with reference to the matters brought into controversy, and were all letters written either to the defendant William Little, from his solicitors, Oliverson & Co., or to his solicitors, from the said George Ashley, the attorney and agent of the estate of Archibald Little, or from James Little to the defendant W. Little, for the purpose of being communicated to the defendants' solicitors, with a view to the defence of the said W. Little in this suit.

Mr. Bethell and *Mr. Dickinson* appeared in support of the motion for production of documents.

Mr. Rolt and *Mr. Cairns*, contra, contended that the defendants could not be compelled to produce the documents asked for by the plaintiffs. The plaintiffs' title to be assignees according to the law of Tenerife was denied by the defendants. The plaintiffs claimed the right to see the letters only on the ground of their being assignees; but until that right was established, the production could not be ordered.

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It was also contended that the letters were privileged communications, and the following cases were cited in support of that argument: *Hughes v. Biddulph*, 4 Russ. 190. *Adams v. Fisher*, 3 M. & C. 526; s. c. 7 Law J. Rep. (N. S.) Chanc. 289. *Edwards v. Jones*, 1 Ph. 501; s. c. 13 Law J. Rep. (N. S.) Chanc. 371. *Smith v. The Duke of Beaufort*, 1 Hare, 507; s. c. 13 Law J. Rep. (N. S.) Chanc. 33. *Storey v. Lord George Lennox*, 1 M. & C. 525; s. c. 6 Law J. Rep. (N. S.) Chanc. 99. *Herring v. Clobery*, 1 Ph. 91; s. c. 11 Law J. Rep. (N. S.) Chanc. 149. *Reid v. Langlois*, 2 Hall & Twells, 59; s. c. 1 Mac. & G. 627; 19 Law J. Rep. (N. S.) Chanc. 337. *Lancaster v. Evors*, 1 Ph. 352; s. c. 13 Law J. Rep. (N. S.) Chanc. 269. *Steele v. Stewart*, 1 Ph. 471; s. c. 14 Law J. Rep. (N. S.) Chanc. 34.

Mr. Bethell, in reply, commented on the above cases, and denied that they supported the argument against production.

ROLFE, V. C. There are one or two points I may now dispose of. The production is resisted on the ground that there is no admission of title. On that part of the case, so far as relates to the title of the assignees, I shall require consideration; but it was said that there was a denial of title in another respect, that there was no admission that William Little had received the consignments as agent. I do not think there is any doubt but that they were received by him as agent. If I should be of opinion that there is a denial of title, then there need be no further consideration; but if there is no denial of title such as to preclude the plaintiffs from seeking production of documents, then I am to consider whether the documents are privileged. It is important that language should be well defined. It is not so well defined here as it might have been; at the same time looser language has been admitted in other cases. As to the letters from James to William Little, I confess, unless I should see reason for altering my opinion, I do not see why they are to be protected. The letters were sent, no doubt, in order that they might be laid before the solicitors; but there is nothing to show that they were intended for the purpose of the litigation.

Judgment reserved.

January 11. LORD CRANWORTH, V. C. The plaintiffs filed this bill as assignees, in Tenerife, of J. and W. Little, who traded there under a firm of Pasley, Little, & Co., and who had, as the plaintiffs alleged, become bankrupt, according to the laws there in force. The defendants are J. and W. Little, and also A. Little. The bill states that the firm in Tenerife was managed there by J. Little, and that he consigned goods and remitted bills of exchange to W. Little, in London, to be realized on account of the Tenerife firm, and that W. Little accordingly did realize money from such goods and bills, to the amount of 4500*l.* and upwards, but that, in order to prevent the Tenerife firm, or the plaintiffs, as their assignees, from obtaining that money, the defendant, A. Little, in collusion with his brother, instituted a fraudulent suit in the court of the lord mayor of London, in which he caused the money in the hands of W. Little, due to the

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Teneriffe firm, to be attached for a large debt alleged to be due to the estate of his late father from that firm; and the object of the present suit is to obtain payment of the money realized by W. Little, notwithstanding the proceedings in the Lord Mayor's Court. The defendants, W. and A. Little, put in a joint answer, in which they wholly deny the plaintiffs' title as assignees, and insist on the proceedings in the Lord Mayor's Court as good and valid proceedings, instituted and carried on without any fraud or collusion whatever; and, in answer to the usual interrogatory as to their possession of papers and documents, they say they have in their possession the particulars mentioned in the second schedule to their answer, and which particulars relate to the matters in the bill mentioned. They deny that by the said particulars the truth of the matters in the bill stated and charged or any of them would appear to be otherwise than as stated by their answer, and they submit they ought not to be ordered to produce the said particulars; and they submit, in addition, that the letters mentioned in the second part of the said second schedule ought not to be produced in this suit, inasmuch as they are all letters written either pending or in contemplation of the litigation in this suit and with reference to the matters in the suit brought into controversy, and are all letters written either to the defendant, W. Little, from his solicitors, or from the said Mr. Ashley, as such attorney as aforesaid, to Messrs. Oliverson & Co., as solicitors of the defendant, A. Little, or from the said J. Little to the defendant, W. Little, for the purpose of being communicated to the said solicitors of the defendant, W. Little, with a view to the defence of the said W. Little in this litigation. The motion now is for the production of all the letters and documents mentioned in the schedule; and it was resisted on two grounds: first, because the plaintiffs' title was denied, and, secondly, because the documents in question were within the ordinary rule of privileged communications.

With respect to the first objection, I am clearly of opinion that it is entitled to no weight. The plaintiffs assert a title which the defendants deny. The defendants admit that they have in their possession documents relating to the matters in the bill mentioned. Some of the matters in the bill mentioned are the facts from which the plaintiffs show or allege they show a title. The documents in question relate, or, for aught that appears in the answer, may relate to those very facts. The defendants, it is true, say that the documents would not show the facts to be as the plaintiffs allege them to be. But that is the very point in issue. The documents relate to the matters in dispute. What is the true result of them, is the matter to be decided. It may be true, as stated by the answer, that by the documents, that is, by them alone, the truth of the plaintiffs' case would not appear, but they may form material links in the chain of proof; and, at all events, as it is admitted they relate to the matters in dispute, the plaintiffs, unless there be some other objection, are entitled to see them in order to form their own opinion whether they do or do not make out or help to make out their title.

On the other question, that is, whether the defendants are entitled to

withhold production on the ground of the documents being privileged, I shall act on the doctrine as laid down by Lord Lyndhurst, in *Hughes v. Biddulph*. There, in answer to a motion for production of documents, an affidavit was made by the defendant, that many of the papers and letters were communications which had passed between her and her country solicitor Mr. Douglas, or her town solicitor Mr. Williams, or between Mr. Douglas and Mr. Williams. Upon a motion for production, Lord Lyndhurst stated his opinion to be, that confidential communications between the defendant and her solicitors, or between the country solicitor and the town solicitor, made in their relation of client and solicitors, either during the cause or with reference to it, though previous to its commencement, ought to be protected; and he accordingly made an order for production of all, except such as the defendant should by affidavit bring within such an exception.

Now, in order to apply the rule as laid down to the present case, it is to be observed, that here the letters were all written either pending or in contemplation of the litigation in this suit, and with reference to the matters brought into controversy in this suit. This clearly brings them within the rule of privilege, so far as their subject matter is concerned; and then the only question is, whether they passed between parties and under circumstances to which the privilege is applicable. And, in order to decide this, it is necessary to class them. First, there are letters to the defendant William from his solicitor. Secondly, letters from Ashley, the attorney in the Lord Mayor's Court, to Oliverson & Co., the solicitors of Archibald.

And thirdly, there are letters from James, who was in the Island of Teneriffe, to William, written for the purpose of their being communicated to the solicitor of the defendant William, with a view to his defence. With respect to the last two classes, there is no difficulty. The second class is certainly protected. If letters between the town and country solicitors are protected, so also must letters passing between the solicitor and an attorney acting within a local jurisdiction, such as is the Lord Mayor's Court, and employed for that purpose, by the solicitor. There is no distinction in principle between the two cases. It is equally clear that the third class is not protected. The letters in that class are letters from one co-defendant to another, and it is quite unimportant that they were written with a view to enable the party to whom they were addressed to consult his solicitor upon them. That which might pass between William and his solicitor, on the subject of those letters, would be protected; but there is no protection as to letters passing among parties themselves, or from a stranger to a party, merely because such letters may have been written in order to enable the person to whom they are sent to communicate them in professional confidence to the solicitor.

This case is clearly distinguishable from *Steel v. Stewart*, where Lord Lyndhurst held, that letters sent from India to the defendant, in order to be laid before his solicitor, were protected. That decision proceeded on the ground, that the person who wrote the letters was an agent of the solicitor sent out to procure evidence, and his letters were, therefore, in the same position as letters from the solicitors

Ex parte Craig.

themselves would have been in. With reference to the letters in the first class, that is, letters written to William from his solicitors, they are protected if written by them merely in the character of solicitors. The answer does not in terms state this to have been the case, though I cannot but suppose that is what was intended to be expressed; and, therefore, as to the letters to William from his solicitors, I shall follow the course adopted by Lord Lyndhurst, in *Hughes v. Biddulph*, that is, I shall order the production of them, except such as the defendant William Little shall state, on his oath, to have been written by him to his solicitors merely as his solicitors.

*Ex parte CRAIG.*¹

January 18 and 30, 1851.

Infant — Practice as to special Case under the 13 & 14 Vict. c. 35.

An application may be made by an infant for a guardian under the 13 & 14 Vict. c. 35, s. 5, without a next friend.

As to signature of counsel to special cases and setting down of special cases for hearing.

THIS was an application made by an infant for the appointment of a guardian to concur in a case to be submitted to the court under the 13 & 14 Vict. c. 35.

By the 5th section of this act it is enacted, "that it shall be lawful for the court, by order to be made in the matter of any lunatic not found such by inquisition, or in the matter of any infant, upon the application of any person on the behalf of such lunatic, or upon the application of such infant, by motion or petition, to appoint any person shown to be, &c., to be the special guardian of such lunatic or infant for the purpose of concurring in such case in the name and on behalf of the lunatic or infant."

Mr. Archibald Smith, for the infant.

[*Knight Bruce*, V. C., suggested whether it was competent to the infant to make the application, and whether the application ought not to be made by the infant by means of his next friend.]

Mr. Archibald Smith contended that the application might be made by the infant without the intervention of a next friend, and that such was directed by the 5th section of the act.

KNIGHT BRUCE, V. C., remarked on the difference of the language used in the 5th section as to lunatics and infants, and said that, on a proper affidavit as to the fitness of the person proposed, the order might be made.

¹ 20 Law J. Rep. (N. S.) Chanc. 136.

Bainbrigg v. Bainbrigg.

On a subsequent day, an application was made, that the above-mentioned special case should be set down for hearing.

By the 10th section it is enacted, that every special case shall be signed by counsel for all parties, &c.

By the 13th section it is enacted, that, when any infant is party to a special case, application may be made to the court by motion for leave to set down the same; and that, upon the hearing of such motion, the said court may give leave to set down such case, if it shall be of opinion that it is proper that the question raised therein shall be determined thereon, &c.

Mr. Archibald Smith, for the motion, stated that he had signed the case as counsel, not only for the plaintiff, but for three of the defendants; and suggested to the court whether this was a sufficient signature of counsel as required by the act. He also asked that the case might be set down for hearing with the petitions, and not in the cause list.

Knight Bruce, V. C., said, he thought that the signature of counsel, as stated, was sufficient, and gave leave that the case should be set down to be heard with the petitions.

BAINBRIGGE v. BAINBRIGGE.¹

December 20, 21, and 23, 1850.

Receiver against Party in Possession — Devisavit vel non — Issue — Verdict — Order nisi for a new Trial.

After a verdict upon an issue *devisavit vel non*, the court appointed a receiver against the party to whom possession of estates had been given by the trustees of the legal estate under an order of this court, though an order *nisi* had been obtained for a new trial.

This was a motion by the plaintiff, asking that, without prejudice to the rights of any mortgagees, an injunction might be granted to restrain William Arnold Bainbrigg from cutting timber on the estates in question in this cause, and also that he might be restrained from receiving the purchase money of a portion of the estate taken by the North Staffordshire Railway Company, and for a receiver.

This bill was filed by T. P. Bainbrigg, on the 8th of January, 1850, to obtain the injunction and receiver now asked for.

On the 8th of November, 1845, he had filed another bill in the suit of *Bainbrigg v. Baddeley*, 9 Beav. 538; s. c. 2 Phil. 705, where the facts are stated. The bill was amended in the same month, and again on the 26th of January, 1846, and again on the 29th of May, 1849, and claimed the estates in question in the cause under a will

¹ 30 Law J. Rep. (n. s.) Chanc. 139.

Bainbrigge v. Bainbrigge.

of Thomas Bainbrigge, dated the 15th of August, 1815, and he sought to impeach a subsequent will, dated the 17th of June, 1818, with a codicil thereto, dated the following day, and for that purpose it prayed that the court would direct an issue *devisavit vel non*, with all proper directions as to parties, and for the removal of all outstanding estates which might impede the trial of the issue.

The legal estate in the testator's lands, &c., under both wills, had become vested in Messrs. Baddeley, Bourdillon, and Jennings; and, under an order of this court in a suit of *Bainbrigge v. Blair*, they had given the possession to the defendant.

The court made the order directing the issue; but before it came on, the plaintiff gave this notice of motion, but it was directed to stand over, upon the defendant undertaking not to act contrary to the notice.

The issue was tried at Stafford in the Summer assizes for 1850, and a verdict was given for the plaintiff, T. P. Bainbrigge. The defendant then applied to the Court of Common Pleas, and obtained an order *nisi* for a new trial; and pending this, the application for the injunction and receiver was renewed.

Mr. Turner and *Mr. Webster*, in support of the motion. *Goulden v. Lydiat*, and *Buckland v. Soultan*, referred to in *Middleton v. Sherburne*, 4 You. & Coll. 358, 373, 374. *Rodgers v. Nowill*, 6 Hare, 325. *Clegg v. Fishwick*, 1 Hall & Twells, 390; s. c. 1 Mac. & G. 294; 19 Law J. Rep. (N. S.) Chanc. 49. *Ridgway v. Roberts*, 4 Hare, 106.

Mr. Roundell Palmer and *Mr. Prior*, contra. This motion is contrary to all principle and practice; the bill is in its nature an ejectment bill. If the case could have been tried without the interposition of the court, the defendant would not have been disturbed. In *Knight v. Duplessis*, 1 Vez. sen. 324, the court held, that it was not a rule to appoint a receiver when a will was disputed by the heir at law, in the absence of other circumstances. In *Pillsworth v. Hop-ton*, 6 Ves. 51, the plaintiff had brought an ejectment and failed, not as alleged upon the merits, but the court refused to grant an injunction to stay waste. In *Smith v. Collyer*, 8 Ves. 89, the estates were in mortgage; the plaintiffs, by their guardians, were in possession. The defendant insisted that the will was not well executed. The lord chancellor said it was trespass, and not waste. There the right was disputed, and he refused to make any order. In *Armistage v. Wadsworth*, 1 Mad. 189, the bill was filed by the heir against the devisees, stating that there were outstanding leases, and praying relief; a plea that there were no outstanding leases was allowed, the court deciding that it had no jurisdiction to direct a delivery of deeds, or to appoint a receiver: involving, as we conceive, this principle of law: that when two persons claim by adverse titles, the one being in possession and the other not, the court does not interfere, except on the ground of their being outstanding estates, which prevent a fair trial being had at law. In *Haigh v. Jagger*, 2 Coll. 231, an injunction

to restrain the working of mines was refused; no insolvency was alleged, and the working had been going on from August, 1844, to July, 1845. The court there distinguished between acts of wilful and destructive waste and enjoyment. In *Jones v. Jones*, 3 Mer. 161, the bill was filed by an heir at law against the devisees, seeking relief on various grounds, and asking for an injunction to stay waste and for a receiver; but a general demurrer was allowed, there being want of diligence, but for which there was no ground why the court should not interfere. In *Davenport v. Davenport*, 7 Hare, 217; s. c. 18 Law J. Rep. (n. s.) Chanc. 163, a demurrer was allowed to a bill filed to restrain waste, the plaintiff never having been in possession, on the ground that he must first establish his right at law. If an action is pending between two parties for the determination of a legal right, this court cannot interfere with the subject of litigation, and, if applied to, its aid must be confined to remove legal obstructions; it cannot be extended to protect the property pending the litigation, or to interfere with the conduct of the parties in relation to the property; and this principle seems to proceed consistently from the cases, that where it is a matter of adverse right, a claim of adverse title, the foundation of that jurisdiction is to remove impediments to the legal trial of that right, and therefore that which is the foundation of the principle of the jurisdiction will limit the jurisdiction exercised for that purpose; and it would be wholly inconsistent were the court to avail itself of those accidental circumstances, which have called its jurisdiction into action, to alter the position of the other party, and put him in a position worse than if there had been no impediment to the trial. This court always governs itself on principle, and the principle of its jurisdiction appears to be to prevent an accidental advantage, which one party has obtained, being used to prevent a fair legal trial and determination of the question between the parties, to take from one the power of using inequitably an accidental advantage. The plaintiff also has not used due diligence in the prosecution of his claim, and he has also become the purchaser of a contract, made under the will of 1818, which was confirmed by the plaintiff's father, the testator's heir at law. Upon such an application, the plaintiff should show a great probability of the title being in him, and that he is likely to suffer irreparable injury; but as to the title, the plaintiff has nothing but the verdict. All the presumptions are in favor of the will of 1818, and nearly all the evidence; the verdict alone was against it. Then, as to the irreparable injury, it does not appear that the mortgagees intend to take any serious proceedings; the property is sufficient to meet its engagements; and though the defendant is represented as insolvent, that is denied, and if the defendant fails, a large sum of money will be found due to him for his expenditure upon the estates.

Mr. Daniel, on behalf of *Mr. R. M. Baddeley*, *Mr. Bourdillon*, and *Mr. Jennings*.

Mr. Turner, in reply. The equitable interest is alone affected by

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these suits, the legal estate being vested in trustees. The case argued before the court is, whether it can interfere when the claims of the parties relate to legal titles. Such are the cases of *Davenport v. Davenport*, *Haigh v. Jaggard*, *Jones v. Jones*, and *Armitage v. Wadsworth*; they do not affect the question respecting the equitable estates. The plaintiff has been guilty of no delay, neither has he done any act to confirm the will of 1818. The jurisdiction of this court in cases of waste has been much enlarged of late years, especially in suits relating to railways which contain cases relating to legal trespass. If this case is heard on further directions, will the court require the title deeds to be given up? *Dormer v. Fortescue*, 3 Atk. 124. If the jurisdiction of the court once attaches, the court extends it for the benefit of the parties. In *Huguenin v. Baseley*, 13 Ves. 105, a receiver was granted against the party having the legal estate; and *Hargrave v. Hargrave*, 9 Beav. 549; s. c. 15 Law J. Rep. (n. s.) Chanc. 280, was a suit between parties claiming to be tenants in common; there a receiver was appointed of a moiety of the estate against the defendant in possession of the whole during the pendency of proceedings at law to establish the title of the plaintiff, whose legitimacy was denied. There is no case like this, in which the court has said there has been want of diligence, neither did the plaintiff's father do any act adverse to the plaintiff's title. The presumptions as to the will of 1818 have been brought to a legal test by the verdict. Then, as to the insolvency of the defendant, it is said he can pay if he is allowed to receive what he has expended: that is not satisfactory; and as no trial can be had for some time, a receiver ought to be appointed.

THE MASTER OF THE ROLLS. I wish for the affidavits, not those respecting waste, as that question has not been pressed. The legal right to the possession of the estate is in the trustees, and neither the plaintiff nor the defendant has of himself a right to sue or to defend: it is thought proper and necessary to have the will established, and to enable the parties to prosecute proper proceedings in a court of law; for that purpose, the outstanding estate has been restrained from being set up, and the trustees are acting under the direction of the court.

In such a case, there having been a trial, and a verdict obtained, there has been a rule *nisi* granted for a new trial; certainly, to some extent it depreciates the value of the verdict. If that rule should be made absolute, a new trial will take place; and the question is, whether this court has authority, and whether it is its duty, to interfere. It has been argued, that the court has no authority, because, in the first place, it is said, this is only a bill filed for the purpose of putting out of the way an outstanding term. I do not understand it in that light. But if it were to be so understood, I do not know of any case in which it has been decided that when the court has obtained jurisdiction over a cause, it is bound to stand by with respect to every thing except the particular point on which the jurisdiction is given, namely, the setting up an outstanding term, and see any iniquity whatever committed by those parties against one another; and that

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having got the jurisdiction, and having in the result of this a necessary jurisdiction to carry out such rights as the parties may establish, it is not to interfere at all, whatever happens. The argument has hardly been carried to that extent, although it has been so argued; yet it has been admitted that if the circumstances are such that there is an immediate and irremediable mischief, the court may have a right to exercise such a jurisdiction. I do not think the court must wait for any such extremity; but seeing that it has, by virtue of the jurisdiction which it has exercised already, a duty to perform on the equity which is reserved, and which may have to be carried into effect after the legal right is established, it must, having regard to that result, have regard to the due treatment and management of the property in the mean time. If that be so, then come the other questions, many of which I cannot think I have any thing to do with. There has been the great imputation of delay, the right in possession having only accrued in the month of July, 1845. The bill was filed on the 8th of November, 1845; and the bill has been prosecuted in a manner very unfortunate; but the question is, whether for that reason the party is to be deprived of any right which he may have on account of any such laches. I cannot say he is. Then, it was said, that he has affirmed the case. On that I might have had an opinion stronger than I ought; but Lord Cottenham had the facts constituting the affirmance on the bill before him, and he did not consider that the title was objectionable, or that the plaintiff was not entitled to relief on that bill; he has therefore been constantly prosecuting that bill.

We come at last to the question, which I adverted to in the first instance, whether, in the case of the estate being vested in trustees, and an action being directed to be brought between persons beneficially interested for the purpose of establishing the validity of the will and a verdict obtained, one party being in possession by an order of the court made on the trustees, the party so in possession is to be allowed, under the circumstances of this case, to keep possession, and have the receipt of the rents and profits, I confess, I incline to the opinion that he ought not; but I will look at the affidavits, and send my order to the registrar.

If these things, some of which I have heard to-day, I must say, for the first time, are to be the guide of the court in cases of this kind, I am anxious that they should be established by higher authority than mine, for they are new to me, and I do not feel that I have jurisdiction or authority to establish any such points of practice or of law.

The MASTER OF THE ROLLS subsequently sent the following minute to the registrar:—

December 23. Refer it to the master of the vacation to appoint a proper person to be receiver of the rents, &c., of the estates in question, with all the usual directions. The appointment not to affect prior incumbrancers, who may think proper to take possession, &c., by virtue of their securities.

In re Skingley.

Restrain the defendant from receiving the rents.

No order as to waste, the defendant undertaking to commit no waste, and to pay into court the money due from the North Staffordshire Railway Company when the same shall be paid to him.¹

In re SKINGLEY, a Lunatic.²

January 17 and 18, 1851.

Waste — Tenant for Life upon Condition of keeping Premises in tenantable Repair — Accidental Fire.

A testator devised to A, for life, a house and other real estate, "he committing no manner of waste, and keeping the premises in good and tenantable repair." In July, 1837, A entered into possession, and in November, 1844, the house was totally destroyed by an accidental fire. In 1845, A was found lunatic by inquisition, and the lunacy was dated from the 1st of October, 1843. Upon petition in lunacy of the remainder-men, who were also committees of the person and estate:—

Held, that the lunatic's estate was liable under the terms of the condition to reinstate the house; and a reference was directed as to what amount ought to be expended in rebuilding, and out of what fund the expense should be paid, with liberty to the next of kin to take a case to law upon the construction of the condition.

HENRY SKINGLEY, by his will, dated on the 2d of August, 1836, devised a mansion house and other real estate to his son, Charles J. Skingley and his assigns for the term of his natural life, he or they committing no manner of waste and keeping the same messuage and premises in good and tenantable repair; with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of Charles J. Skingley in tail male, with remainder to his daughters; with remainder to the testator's two other sons, Henry Skingley and George D. Skingley, as tenants in common in tail.

The testator died in July, 1837, and Charles J. Skingley thereupon entered into possession of the estates so devised to him for life, and continued in such possession until February, 1845; when, upon inquisition, he was found to be a person of unsound mind, and to have been in that state from the 1st of October, 1843.

In November, 1844, the mansion house was destroyed by fire.

By an order, dated the 1st of June, 1848, it was referred to the master to inquire and state whether any and what repairs were necessary and proper to be made upon any and what parts of the lunatic's estate.

In 1850, the present petition was presented by Henry Skingley and George D. Skingley, the tenants in tail in remainder and also the committees of the person and estate of the lunatic, praying that it might be declared that the mansion house ought to be rebuilt at the

¹ Upon appeal to the lord chancellor, he discharged the order on the 29th of January, 1851.

² 20 Law J. Rep. (n. s.) Chanc. 142.

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expense of the lunatic's estate, and for a reference to inquire what would be the expense of rebuilding the said mansion house, and out of what fund the same should be paid.

Mr. J. Parker and *Mr. S. Miller*, for the petitioners. The lunatic took an estate for life in the devised premises, upon the condition of keeping the same in repair. As he accepted the estate, he is liable to the performance of the condition. If this were a case of landlord and tenant, the words "keeping the premises in tenantable repair" would imply a covenant, on the part of the tenant, to reinstate the premises if burnt down. Independently of the statute 6 Anne, c. 31, at common law it was waste for a tenant to suffer a house to be burnt, and that whether the fire occurred by negligence or mischance. *Chesterfield v. Bolton*, 2 Comyn, Rep. 626. The statute of 6 Anne, c. 31, was not meant to interfere with cases of contract or condition. *Bullock v. Dommitt*, 6 Term Rep. 650. 1 Blackstone's Com. 431. *Viscount of Canterbury v. The Attorney General*, 1 Phil. 306; s. c. 12 Law J. Rep. (n. s.) Chanc. 281. Com. Dig., tit. "Waste," D. 2. Rolle's Abr. "Action sur case," B, Pur Fewe. Co. Litt. 53, b. *Filliter v. Phippard*, 11 Q. B. Rep. 347; s. c. 17 Law J. Rep. (n. s.) Q. B. 89. The liability of a spiritual person to repair a house burnt by fire is clear. *Report of the Ecclesiastical Commissioners*, p. 54. As to the effect of a condition annexed to a gift, the following cases were cited: *Taylor v. Popham*, 1 Bro. C. C. 168. *Barnardiston v. Fane*, 2 Vern. 366. *Grimston v. Lord Bruce*, Salk. 156. *Wigg v. Wigg*, 1 Atk. 382. *Hodgson v. Rawson*, 1 Ves. sen. 47. *Caldwall v. Baylis*, 2 Mer. 408. *Marquis of Ormonde v. Kynersley*, 5 Mad. 369. *Messenger v. Andrews*, 4 Russ. 478.

Mr. Roll and *Mr. Hardy*, for one of the next of kin of the lunatic, contra. It is not doubted but that the obligation created by the will must be satisfied; but the question is, What is the extent of that obligation? The tenant for life is to abstain from any act of voluntary or permissive waste. If the premises are actually destroyed by an event over which the tenant for life had no control, the condition of keeping them in tenantable repair becomes impossible. The cases cited apply to the relation of landlord and tenant, where there is a covenant, express or implied, to keep in repair and deliver up the premises at the end of the term in the same condition. But where a tenant contracted to deliver up at the end of his lease certain articles mentioned in an inventory, and the same were destroyed by fire, it was held, that the contract did not bind him to deliver up the articles at all events. *Mackenzie v. Macleod*, 10 Bing. 385; s. c. 3 Law J. Rep. (n. s.) C. P. 79. Here the intention of the testator is to be regarded; who, if he had intended to impose on the devisee for life a burden, which might be more than equivalent to the advantages given, would have used language applicable expressly to the particular case. Secondly, the time has not arrived for discussing this question, for the petitioners may never come into possession, and the house is not

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wanted for the comfort of the lunatic, or for the advantage of the estate.

Mr. Parker, in reply. The tenant in remainder would be entitled to bring an action on the case in the nature of an action of waste; Cruise's Dig. title 3, c. 2, s. 31, 80; and, if not, he is entitled to redress in this court by making the waste good out of the estate, for the court will not permit the tenant for life to make his estate more beneficial to himself than the testator intended. *Messenger v. Andrews*. If the waste is to be made good out of the life estate, then the petitioners are right in coming to the court during the continuance of the life estate.

The LORD CHANCELLOR. The question is of that nature that if the next of kin desire it, I will give them an opportunity of further inquiry; but without prejudice to that, I will state what my impressions are. It seems to me that there is no reasonable doubt of the testator's intention that the premises should be kept in a state fit for the enjoyment of the remainder-men. The language which he uses is plain, and may create an obligation of a great extent; to measure the extent we must refer to the legal authorities. It is not necessary to suppose that the testator, in using this language, had the particular event in his contemplation, or that he ever estimated the degree of responsibility that might result from it. The words are, "committing no manner of waste and keeping the premises in good and tenantable repair." Now, these same words have received a definite construction; and I cannot see any reason why, where the language is plain and unambiguous, the same words should receive a different construction, when found in a will, to what they should receive when found in any other legal instrument. The words here are clear, and it has been determined upon those words, that a party must reinstate that which has been destroyed by accident. The statute of Anne does not vary the question. That statute passed to put an end to a custom which prevailed at common law, by which a man was made liable for all the consequences of a fire commencing in his own house, in order, as it may be supposed, to excite to greater care and diligence. An analogous custom also prevailed in respect to common carriers, who were liable for goods committed to them, even though they were robbed by violence and were incapable of resistance. The statute of Anne then was passed to put an end to the particular custom. It happens that, in this statute, a clause was introduced for greater caution, that nothing in the act should extend to defeat or make void any contract between landlord and tenant. Even if that provision had not been introduced, no such contract would have been affected by the statute, for parties may contract themselves out of the benefits of a statute, provided their contract is not in contravention of the statute. Upon the correct construction of these words, I think there is a clear obligation on the tenant for life to reinstate the premises which have been destroyed by an accidental fire.

The next question is, whether the present application is wrong in

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point of form or of time. This is the case of a lunatic who is possessed of personal estate. It is the duty of the committees to attend to the management of that estate, and not allow it to be administered without informing the court of the liabilities to which it may be subject. They do inform the court that they consider the estate is subject to an obligation which they are interested in enforcing, and they ask that if the obligation really exists, they may have the benefit of the personal estate in discharging that obligation. It does not appear to me that the committees could take any course less injurious to the estate. As to the time, as the only way of enforcing the condition is by making the life estate amenable to the performance of the obligation, they must come while that estate is subsisting. Unless the next of kin desire to have a case sent to law upon the construction of that clause of the will, I think it should be referred to the master to inquire and state as to the amount of expense to be incurred in rebuilding the mansion house, and out of what fund such expense ought to come.

In re THE NORTH OF ENGLAND BANKING COMPANY.¹

March 12, 1851.

Winding-up Acts — Set-off — Percentage to Suitors' Fee Fund.

In winding up joint-stock companies, the claims of a contributory against the company in respect of loans made by him to the company, or in respect of informal calls made by the directors prior to the winding-up order, and applied by them in liquidation of the debts of the company, are to be set off against calls, and the amount cancelled is exempt from percentage to the suitor's fee fund.

In winding up the affairs of the North of England Banking Company, the official manager paid and divided amongst the creditors of the bank, not being shareholders, in payment of their debts, 142,204*l.* 5*s.* Part of this payment was made by the indorsement to the creditors, by the official managers, of bills of exchange received by them from debtors to the bank; and of these bills, a few, amounting to 824*l.* 9*s.* 6*d.*, were dishonored, and were afterwards taken up by the official managers. The official managers also satisfied certain balances appearing at the time of their appointment to be due to contributories of the company in respect of loans made by them to the company, or in respect of informal calls made by the directors prior to the winding-up order, and applied by them in the liquidation of the debts of the company, by placing on the debit side of each contributory's account in the ledger the amount of the call made by the master in respect of his shares, thereby extinguishing such contributory's demands on the company to the extent of 181,711*l.* 14*s.* 4*d.* The time having arrived for the official managers to pay to the credit of the Suitors' Fee

¹ 15 Jur. 301. *Ex relations.*

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Fund the percentage required by the 35th section of the act 12 & 13 Vict. c. 108,¹ doubts arose as to the amount of the percentage that the master ought to certify upon the "moneys received by the official managers, and paid or divided among the creditors or contributories of the company" in winding up its affairs. The master made two calls of 30*l.* and 20*l.* per share, and, in ascertaining the amount of the calls, treated the above-mentioned balances as debts due from the company. The official managers submitted that the percentage was payable upon the sum of 142,204*l.* 5*s.* only. Under these circumstances, and in pursuance of the 100th and 120th sections of the act 11 & 12 Vict. c. 45, the master now made a special report, finding and certifying the above-mentioned facts as special circumstances, and requesting directions in reference to the 35th section, and that the court would declare whether the percentage therein mentioned ought to be certified to be payable to the Suitors' Fee Fund upon the sums of 824*l.* 9*s.* 6*d.* and 181,711*l.* 14*s.* 4*d.*, or either and which of them, as well as upon the sum of 142,204*l.* 5*s.*, and for directions accordingly; and he directed the official managers to move the court, and to give notice of the motion to the solicitor to the Suitors' Fee Fund.

Bacon and J. V. Prior, for the official managers. The official managers have, as directed by the 34th section of the act of 1848, opened a ledger, showing the separate account of each contributory. Some of the contributories proved to be creditors of the company. These have been credited in one column with the sums due to them from the company, and debited in the other with the calls. The act of 1848 directs a set-off. By the 86th section of that act, the master is to order payment of *the balance* which shall be due from each contributory after debiting him with calls. The 61st section directs, in certain cases, the claim of a contributory to be set off against that of the official manager. The 181,711*l.* 14*s.* 4*d.* has been settled in account by this method of set-off, and not received by the official managers with one hand and paid back again with the other. The 35th section of the act of 1849 directs percentage to be paid "upon the moneys received by the official managers, and paid or divided among the creditors or contributories." This sum was never paid or received, and it would be against the words of the act to certify the percentage upon any part of it. As to the 824*l.* 9*s.* 6*d.*, it is the practice of the official managers to enter in their accounts all payments in bills as if made in cash. Accordingly, in this case, they

¹ The 35th section is as follows: "That in lieu of all fees to be received or charged in aid of the Suitors' Fee Fund, in respect of any proceedings, orders, or other matters under the said act (the act 11 & 12 Vict. c. 45) or this act, the interim or provisional manager or the official manager of any company, the affairs of which shall be wound up under the said act, shall pay into the Bank of England, with the privy of the accountant general of her majesty's High Court of Chancery in England or Ireland respectively, to be there placed to the credit of the Suitors' Fee Fund account, such amount, by way of percentage, as shall be certified by the master upon the moneys received by the official manager, and paid or divided amongst the creditors or the contributories of such company in winding up the affairs thereof, not exceeding the sums following:" [Then follows a scale of sums.]

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entered the 82*l.* 9*s.* 6*d.* when the bills were originally indorsed. The percentage attached then, and cannot be levied twice upon the same sum.

The Attorney General and Taylor, for the solicitor of the Suitors' Fee Fund. If the construction put upon the 35th section were correct, all the work done in winding up a company might have to be done gratuitously. In some companies there are no third parties creditors, and the only object of the winding up is to settle accounts between the members in default and those in advance. The labor of winding up is the same in these as in other companies; but according to this construction the Suitors' Fee Fund is to receive in the one case the full percentage prescribed by the act; in the other, nothing.

LORD CHANCELLOR, (without waiting a reply.) This act was intended to facilitate arrangements for winding up joint-stock companies in respect of transactions which, had they been adjusted and settled by the ordinary course of proceeding, must have led to incalculable expense, consumption of public time, and to the most complicated litigation. Such a task was a very difficult one — one almost impossible to carry out — beyond human wisdom to carry out so as to meet all contingencies. A great evil existed, and a remedy was attempted; a remedy which, although generally effective, might not be perfect as applied to some individual cases, and therefore it was thought for the public benefit that this act should be passed. It was difficult to anticipate what might be the comparative degree of trouble and time which would attend particular cases. The object of the legislature seems to have been to provide some mode by which the occupation of the public time should be paid for, which, upon the whole, would remunerate, without looking to see whether each particular case might pay in proportion to the trouble and time which it occupied. It is true, as was suggested in the course of the argument, one case may require and give very little trouble, and in another the time which the cause has taken may be much greater, and yet in the one the remuneration might exceed, in the other it might fall short; but then, if the legislature had left it for ascertainment in each particular case, it would have been very inconvenient, and would have given occasion to a great deal of trouble. Therefore the legislature adopted a general rule, and in so doing — I presume upon some calculation or inquiry — thought the public, upon the whole, would be the gainers. It is a general arrangement for a public evil, calculated upon the whole to accomplish what would be just between these concerns, and the only mode of doing that was by making the payment to depend, not upon the degree of trouble or the quantity of time, but upon a money calculation on a money scale, that being the most easy to be ascertained.

Accordingly, by the 35th section it is provided, that, in lieu of fees to be paid to the Suitors' Fee Fund, the official managers of any company, the affairs of which shall be wound up under the act, shall pay into the Bank of England, to the credit of the fee fund, "such

amount, by way of percentage, as shall be certified by the master, upon the moneys received by the official managers, and paid or divided among the creditors or contributories of such company, in winding up the affairs thereof." Now, it is material to see whether the legislature acted upon the presumption that those sums which passed out of the contributories, in order to do justice to the concern in the state in which it was found, would in all cases be actually paid. In order to ascertain that, you must refer to the 61st section of the act passed *in pari materia*, (11 & 12 Vict. c. 45.) That section first of all provides for a case in which there shall be no set-off, that is to say, if the party does not receive his dividend, or bonus, or any other sum which may be payable to him in his character of owner of the shares, it provides that that shall not be a subject of set-off; but the latter part of the section says, "Provided nevertheless, that if a balance shall appear to be and shall be justly due from any contributory on his account with the company as contributory, as entered in the books thereof," that is to say, taking his account as a shareholder simply, seeing what he has been paid as shareholder, and what he has paid, if there should appear a balance due; for example, that he ought to have paid upon his 100*l.* share 30*l.*, and he has paid but 20*l.*; "and such a contributory shall, upon a distinct account, contract, or dealing, be a creditor of such company," that is to say, if he ought to pay 50*l.* in respect of his account as shareholder; but he has got 60*l.* to receive for money lent to the company, (because he does not lend as a shareholder, he lends as a banker—he lends as a creditor;) and if he is a creditor, then "the official manager shall set off the amount of such balance against the demand which such contributory shall have or be entitled to as such creditor."

Now, what is the inference from and effect of that? It is that the legislature did not contemplate, that where a man had money to receive from the company, and also money to pay, he should pay it first, and be repaid afterwards; but the legislature contemplated that so much as was due to him, even to the whole extent of what he had to pay, should be allowed to him, and the balance only, if any, paid to the official manager. Bearing in mind, therefore, that the 12 & 13 Vict. c. 108, was passed after the 11 & 12 Vict. c. 45, and therefore with the knowledge that there would be many cases in which persons would be liable to contribute to a certain extent, without being liable to pay to a certain extent,—for they contribute as much by having a debt simply which is due to them, as if they had paid so much money,—by the 12 & 13 Vict. c. 108, the legislature contemplated necessarily that there would be contributions to be made good by certain persons, but not made good by actual payment of moneys, but by payment of set-off on account. When, therefore, the legislature provided that shareholders who are creditors of the concern should not be compelled to pay what might be due by them for calls, and afterwards to call for payment of what is due to them as creditors, but gave the parties a right to set it off; finding that that was the contemplation of the legislature, I must then construe this clause with reference to that state of things; and then I cannot help sup-

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posing, that with that knowledge, and with that view, if it had been intended that a payment should be made to the Suitor's Fee Fund in respect of so much as was settled in account between the official manager and the shareholders, without money passing, there would have been some words or other to meet such a case; but the words are very few, and consequently very simple. [His lordship read the 35th section of the act 12 & 13 Vict. c. 108.] Now, I own, it strikes me those words are perfectly distinct, and that I cannot call moneys "received and paid," within the 35th section, which I find by the 61st section of the previous act were not to be paid or received, but were to be settled in account. Therefore, it seems to me, however beneficial a test it may turn out to be which the legislature adopted in favor of this particular concern, yet it was a test which it was considered would remunerate for the consumption of public time and the service of its officers, although it might operate more or less favorably in each particular case. The 86th section appears to me to have relation to a different state of things. [His lordship read the 86th section of the act 11 & 12 Vict. c. 45.¹] There you observe again, that although it relates to a different state of things, yet that section contemplates the same result, that is to say, it contemplates monetary transactions between the official manager and the representatives of the entire concern, and the individual subscriber, not upon the footing of receipt and payment, but upon the footing of account; and accordingly it says, that the party, unless there should be reason shown to the contrary, shall be debited with the amount of the call, and shall pay to the official manager the balance which may be due to him; plainly, as it appears to me, pointing out that it was contemplated that certain transactions of a money nature should be adjusted in the shape of account.

From the best care that I given to the case, it appears to me that the 181,711*l.* 14*s.* 4*d.* — which I understand to be money which never was paid by the contributories, and which never ought to have been paid by them, because there was so much due to them as creditors of the concern — which never ought to have been paid by them, and never having been in the situation that it ought to have been paid, was consequently not paid, and therefore not received by the official manager — is not liable to percentage under the 35th section. And in truth every word of the act is satisfied, in this particular case, by payment of percentage on the 142,204*l.* 5*s.*, which is the amount of the money that has been "received by the official managers, and paid and divided among the creditors or contributories of the company," although they have, in the course of so doing, satisfied a much larger sum. Such appears to me to be the construction of the act, as applied

¹ The 86th section is as follows: "That unless cause shall be shown to the contrary, to the satisfaction of the master, at the time and place appointed for making such call, the master shall then make an order for such call, and for the payment to the official manager of the balance which shall be due from the respective contributories, after debiting them with the amount of such call, on or before a day and at a place to be therein fixed, such day not being earlier than three weeks from the date of the peremptory order."

Caton v. Ridout.

to a particular case, and I do not think that that construction is rendered doubtful by the presence of any thing in the act which may be applicable to some other possible case; because I can easily imagine, and it actually appears, and no doubt has repeatedly appeared, that cases have been presented in such a particular form as to have met every word in this act; and that, where the act speaks about payment to contributories without any case of account due in respect of calls, that very fairly and reasonably applies to the case where a man has advanced more money to a company than may be due to them, after having paid up all calls. In that case the payment to the contributories would be a payment to them in their character of creditors; and unless I have before me some evidence, not in any particular or individual case, but generally showing that the course adopted does not give a fair remuneration, it will not be necessary to consider whether the act ought or ought not to be altered in that respect. But, as at present advised, I think that the clause is a clause which not only would not authorize the court to increase the payment to be made to the Suitors' Fee Fund, but is a very prudent clause, arising out of the considerations that have been adverted to, and having regard to the extent of the difficulty of framing an act which should effect the general object of winding up, without interfering with particular cases. I think, therefore, that the section would not authorize any alteration, and that, so far as this case is concerned, the construction now put upon the act is one that corresponds with the intention of the legislature and the rights of the public. The order will, therefore, be for the payment of the percentage upon the sum of 142,204*l.* 5*s.*, and not upon the 181,711*l.* 14*s.* 4*d.*

After some discussion, it was ordered that the Suitors' Fee Fund should bear its own costs.

CATON v. RIDOUT.¹

June 11, 1850.

Administration Suit — Executor's Affidavit.

In particular circumstances, sums will be allowed to an executor on passing accounts on his own affidavit, and without vouchers.

THIS was a suit for the administration of the estate of a testator, who was a clergyman, who with his wife had had a considerable fortune. By the decree a reference was sent to the master, to take an account of the personal estate of the testator come to the hands of the executrix, his widow. The executrix claimed to be allowed in her accounts 27*l.* for wages of gardener, lady's maid, housemaid, and boy; and for keeping the rectory house after the testator's death, 16*l.*

¹ 15 Jur. 308.

Patchett v. Holgate.

16s.; but the master disallowed these items, as the executrix had no vouchers. The executrix took exceptions to the report.

James Parker and *S. Miller*, for the exceptions.

Roundell Palmer and *Greene*, for the plaintiff.

KNIGHT BRUCE, V. C. Something must have been due to the servants for wages at the time of the testator's death. As the testator lived in the rectory house, and as his estate would have been liable for dilapidations, it is reasonable that a person should be put in the house to take care of it. I think it would not be too much to allow these items, although no vouchers have been produced. Considering the nature of the establishment, and the position of the parties, I think that vouchers may be dispensed with.

PATCHETT v. HOLGATE.¹

July 19, 1850.

Evidence — Husband and Wife — Proof of Access — Legitimacy.

A husband and wife lived separate. Eight years afterwards the wife had a child. The husband swore in an affidavit that he had had intercourse with his wife since the separation, but the court refused to admit this as evidence.

THIS case came on upon exceptions to the master's report. The testator in the cause, Jonas Holgate, a cattle dealer, by his will gave the residue of his real and personal estate to certain trustees, to divide the same into five parts, and to pay one fifth part to each of his children for life, and after their respective deaths, to divide the same among their respective issue. One of Jonas Holgate's children was Susannah, who in 1836 married Thomas Wright, and in 1839 they separated by mutual agreement. On the 7th of March, 1847, a male child was born of Susannah Wright, and she died on the 31st of July, 1848. At the hearing of the cause a reference was directed to the master, to inquire and state whether there was any lawful issue of Susannah, and he found that the infant, who was named Tom, was the only child and lawful issue of his mother Susannah by her marriage with Thomas Wright, her husband. From this report exceptions were taken.

Russell and *Elmsley*, for the exceptions, said that the master, in his finding, had relied on the affidavit of the husband, who swore that he had, on several occasions after the separation, had intercourse with his wife. This evidence was wholly inadmissible, and ought to have

¹ 15 Jur. 308.

Ex parte Staffon's Executors, in re The N. of England Joint-stock Banking Co.

been rejected by the master. The principle was clear and indisputable, that neither the husband nor the wife could be a witness to prove access or non-access. Littledale, J., acted on that principle in the case of *Rex v. The Inhabitants of Sourton*, 5 Ad. & El. 188, 189.

Malins and Piggott, for the report, relied on *Pendrell v. Pendrell*, B. N. P. 113, and 2 Stark. Ev. 139; and observed that no objection had been taken to the reception of the affidavit before the master.

Lee (amicus curiæ) mentioned the case of *Goodright d. Stevens v. Moss*, 2 Cowp. 591.

Kenyon Parker and Rogers, for the trustees.

Knight Bruce, V. C. My own impression always was, that the evidence of the father and mother, or either, is admissible to prove a pedigree, such as on the point of marriage, but that such evidence was not receivable on the question of access or non-access. It has been said that no exception has been taken to the reception of the affidavit of the father by the master; but that will not be any reason why I am to shut my eyes and ears to the fact of such an affidavit having been made; and, if need be, I shall allow the exception to be amended in that respect. As, however, I view the point of law, I feel bound to shut both my eyes and ears to this affidavit of the father; and I cannot understand how, in such a state of circumstances, I can refuse an issue to try the question in dispute, and an issue must accordingly be directed, to try whether the infant was the lawful child of Susannah Wright. In trying this, the common-law judge will decide for himself whether the evidence of the husband of Susannah is admissible.

*Ex parte STAFFON'S EXECUTORS, in re THE NORTH OF ENGLAND
JOINT-STOCK BANKING COMPANY.*¹

March 10, 1851.

Joint-stock Companies Winding-up Acts — Executor — Contributory.

J. S. purchased, through a broker, 120 shares in a joint-stock banking company, in respect of ten of which the grandson of the purchaser executed the deed of transfer as his agent. No other deed of transfer was executed. The purchaser received the dividends upon the whole:—

Held, that he was a contributory in respect of the whole 120 shares, and his executors properly on the list.

This was a motion, in the matter of the North of England Joint-stock Banking Company, on behalf of the surviving executors of

¹ 15 Jur. 321.

Ex parte Staffon's Executors, in re The N. of England Joint-stock Banking Co.

John Staffon, that the order or decision of Master Farrer, made on the 19th of February, 1851, whereby the names of the executors were included in or retained or ordered to remain on the list of contributories of the company, as contributories without qualification in respect of 700 shares therein, might be reversed or discharged, and that the names of the executors might be struck out and excluded from such list of contributories; or in case the court should be of opinion that the names of the executors should, in respect of any of the shares, be included in the list, then that it might be ordered that their names be included with a qualification, that in respect of such respective shares they were liable only as contributories subsequent to the several times of the respective purchases by John Staffon, and up to the time of his decease only.

The master's notes of the case were as follows: "The executors of John Staffon are included in the list of contributories in respect of 700 shares. They were originally settled in the list. The case has been reopened on review on the part of the residuary legatees of the testator, using the names of the executors. The first purchase by the testator was of 120 shares. On the 9th of October, 1844, Mary Unthank, Caleb Richardson, and William Richardson offered eighty shares to the directors, under the 22d clause of the deed of settlement, at 4*l.* per share. The directors declined the offer. On the same day the parties offered in like manner forty shares. This was also declined by the directors. On the 18th of October these 120 shares were sold, through J. Glover, a broker, to the testator. On the 18th of October, 1844, Unthank and the Richardsons gave the usual notices to the bank of their having agreed to sell and transfer the aforesaid forty and eighty shares to the testator. The notices were on the same day submitted to the board of directors, and the transfer of each lot of shares was allowed. On the 26th of October, 1844, a deed of covenant and transfer, made between Mary Unthank, Caleb Richardson, and William Richardson, of the first part; the testator, John Staffon, of the second part; and G. Burdis and David Flintoff, public officers of the company, of the third part, was executed, by which the parties of the first part transferred to the testator ten shares. This transfer was expressed to be subject to the covenants of the deed of settlement; and the testator covenanted with the parties of the first and third parts to pay all instalments then or thereafter to become due, to perform all the covenants, stipulations, provisions, and regulations contained in the deed of settlement, and all other stipulations affecting, or intended to affect, holders of shares. This deed of transfer was similar to that which is reported at length in *Dodgson's Case*, 3 De G. & S. 85. The certificates of shares in the possession of the vendors were delivered up to the bank, and new certificates, signed by George Burdis, managing director, were delivered by the bank to Staffon. No transfer of the other 110 shares was made." There was other evidence of the payment of the purchase money, and it appeared to the master that the 120 shares formed the subject of a single contract, and that he must take the whole to be governed by the terms of the deed of transfer

Ex parte Staffon's Executors, in re The N. of England Joint-stock Banking Co.

of the ten shares; and under these circumstances he was of opinion that the executors were properly included in the list of contributories as to the whole 120 shares. The grandson of the testator was called as a witness before the master, to show that the signature, "John Staffon," to the transfer was his handwriting, and not the testator's, and that the deed was executed by him, and not by the testator; but he also proved that he acted as the agent, and had the verbal authority of the testator; and the evidence appeared to the master to be clear that the testator ratified and acted upon the transaction. Although in law the deed might not be the deed of the testator, yet the master thought that in this proceeding between partners the testator was bound by the act of the grandson, as if he himself had signed and executed the deed of transfer. The third purchase was of 100 shares, and the evidence was the broker's note, dated the 16th of November, 1844, and the notice by which it appeared that the directors sold these 100 shares to the testator. The notice was signed by the managing director, and was crossed by the words, "transferred the 4th of December, 1844." The fourth purchase was of fifty shares. There was the broker's note, the 1st of January, 1845; the usual offer to and refusal by the directors, and the usual notice to and allowance by the directors, and the offer was crossed, "transferred the 3d of March, 1845." These four purchases made up 270 shares. Then was produced a dividend warrant, being the dividend on 270 shares. The money was received by John M. Stranghan, the testator's grandson, or by his authority, and carried to the account of the testator. The fifth and sixth purchases were of thirty and fifty shares. There were the usual broker's notes, dated the 23d of August and the 30th of May, 1845; the usual offers to and refusal by the directors. The testator had then 350 shares. The dividend warrant, dated the 9th of September, 1845, was produced, signed by the testator himself, being a dividend on 350 shares. Between this half year's dividend and the next half year's dividend the testator made further purchases of 350 shares, making a total of 700. The evidence was the broker's notes, offers to the bank and refusals, notices of sale and allowances; and there was given in evidence a dividend warrant, dated in March, 1846, signed "John Staffon," being the dividend on 700 shares. There was another similar dividend warrant in respect of 700 shares. These warrants were signed by John Stranghan, for and by the authority of the testator; and it was in evidence that all the moneys were carried to the account of and received by the testator. For all these cases certificates were delivered to the testator. The following is a copy of one of them:—

"The North of England Joint-stock Banking Company. Forty shares, Nos. 3771 to 3800; 10,226 to 10,235.

"Newcastle-upon-Tyne.

"This is to certify, that John Staffon, of South Shields, in the county of Durham, is a proprietor of forty shares in the capital stock of the North of England Joint-stock Banking Company, and that, as the proprietor of the said shares, he hath become entitled to all the

Ex parte Staffon's Executors, in re The N. of England Joint-stock Banking Co.

benefits and emoluments thereof, upon the terms and stipulations contained in the deed of settlement of the said company, bearing date the 4th day of November, 1832, with powers to transfer the same shares, subject to the restrictions regulating transfers of shares. As witness my hand the 4th day of November, 1844.

"GEORGE BURDIS, Managing Director.

"Registered, *W. H. Robinson.*"

In a cash book of the testator, the following debtor and creditor account appeared, which was laid before the master:—

"North of England Joint-stock Bank, 1845.

"*Dr.*

" March 10.	To one half year's dividend,	} £55 13 9
	270 shares	
Sept. 10.	Ditto half ditto on 270 ditto	55 13 9
1846, March 10.	Ditto on 700 ditto	144 7 6
Sept. 10.	Ditto on 700 ditto	144 7 6
1847, March 10.	Ditto on 700 ditto	144 7 6

"*Contra Cr.*

" March 10.	By cash	£55 13 9
Sept. 10.	By cash	55 13 9
March 10.	By cash	144 7 6
Sept. 10.	By cash	144 7 6"

The master found no evidence of the name of the testator having been returned as being on the list of shareholders of the company, and came to the conclusion to leave the executors on the list of contributories for 700 shares.

Russell and W. D. Lewis were in support of the motion. They cited *Hall's Case*, 1 Mac. & G. 307. *Sayles v. Blane*, 14 Jur. 87. *Maguire's Case*, 3 De G. & S. 31. *Lawes's Case*, 15 Jur. 185. 2 Eng. Rep. 106. *Dodgson's Case*, 3 De G. & S. 85. *Sanderson's Case*, Id. 66. *Gouthwaite's Case*, 15 Jur. 137. 2 Eng. Rep. 57. *Sutton's Case*, 14 Jur. 966.

Bacon and J. V. Prior, for the official manager, were not called on.

Knight Bruce, V. C. This is an application by Mr. Staffon by means of his executor, which is the same thing, that it may be declared that he did not become the owner of certain shares. But he did contract to purchase them from the persons entitled to sell them; he paid for them, and entered into the receipt of the profits. It is not competent for him to say that he is not the holder of the shares, unless the persons associated with him reject or endeavor to reject him. There is, however, no difficulty in this respect, as they did not reject him. It is, therefore, not competent to him to support the contention in this respect. Then he seeks some qualification in this way—120 shares were bought in one parcel, and, it is to be inferred, at the same time. Now, as to ten of that parcel, a deed was prepared, but not executed by Mr. Staffon—it was signed under a

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general authority; so that this deed never became his deed. As he received the profits, he acceded to the terms of the contract on which the vendors sold. Can I draw any other inference than that the same terms governed the contract as to the 120 as governed the ten? No other inference can be drawn, so that whatever is applicable to the ten, must be applicable to the others. The motion as to the 120 must be refused. I shall make this order: Refuse the motion as to 120 shares; as to the remaining 580 shares, refer it to the master to inquire what were the terms and nature of the contract as to those shares, with liberty to state circumstances specially.

THE SOUTH STAFFORDSHIRE RAILWAY COMPANY v. HALL.¹

February 24 and 26, and March 22, 1851.

Railway Company — Compensation — Injunction.

A railway having been made across the road leading to a farm, the land owner served a notice on the railway company under the Lands Clauses Act, claiming 550*l.* as compensation, or requiring the company to summon a jury to assess the compensation. The company filed their bill, alleging that the damage complained of was not an injuriously affecting the land within the Lands Clauses Act, and obtained an *ex parte* injunction to restrain the land owner from taking any other proceedings under that act:—

Held, that the injunction could not be maintained.

THIS was a motion to dissolve an injunction which had been granted *ex parte* on the 2d of January. The facts of the case are sufficiently stated by his lordship in his judgment.

James Parker and *Willcock*, in support of the application. This bill is almost exactly the same as in the case of *The London and North-western Railway Company v. Smith*, 1 Mac. & G. 216, 13 Jur. 417; but in this case the injury is private merely. The railway does not touch the farm, and the question is, whether the words in the 68th section of the Lands Clauses Act, "injuriously affected," apply to such consequential damage, or whether a part of the land must be actually taken. It has been decided at law, that taking the land has nothing to do with it. *Cooling v. The Great Northern Railway Company*, 14 Jur. 128. *Reg. v. The Eastern Counties Railway Company*, 2 Railw. Cas. 736, 2 Q. B. 347. The jury may find there has been no damage. *Reg. v. The Lancaster and Preston Railway Company*, 6 Q. B. 759. *Coward v. The South-western Railway Company*, 5 Railw. Cas. 703. If the company say no damage has been done, they have a good defence at law, and this bill is demurrable. This order is also irregular, as it does not give directions to have the legal rights tried, *Harman v. Jones*, Cr. & Ph. 299, and also because the common injunction would have been the proper means. In the case

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of *The East and West India Docks and Birmingham Junction Railway Company v. Gatlke*, 15 Jur. 261, *ante*, it has been decided by the lord chancellor, on appeal, that such an injunction cannot be maintained.

Bethell and *Speed*, for the company, in support of the injunction. The principle on which equity interferes is to restrain parties from improperly exercising the powers given to them by act of Parliament. *Blakemore v. The Glamorgan Canal Company*, 1 My. & K. 154. That was the principle on which *Smith's Case* was decided; and *Smith's Case* is exactly the same as this, and both depend on the question whether the damage falls within the 16th section of the Railway Clauses Act, and the 68th section of the Lands Clauses Consolidation Act. On the facts, there is more than a doubt whether this case falls under the acts. The defendants made no application for compensation for the stoppage of their road during the progress of the works; the railway has been long completed, and the gates are put across; the only complaint of the defendants was, that the gates were not conveniently constructed; and because their complaints were not attended to, they gave this notice. Sect. 16 of the Railway Clauses Act gives compensation for all damage. How can the defendants be injuriously affected by the plaintiffs' doing that which they have a statutory right to do? They may be *damnose* affected, but not injuriously. The defendants must show that we have done wrong. The common injunction would not apply, as the defendants have as yet no right of action; their right, if any, has not yet accrued. Sect. 68 only applies to illegal trespass and injury; sect. 23 provides for damage lawfully done. In *Cooling v. The Great Northern Railway Company*, 14 Jur. 128, the court admitted that it was a case for compensation. *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. 347, was on a private act of Parliament. There is no occasion to make any provision for a trial at law till the defendant says he is ready to try. In *Gatlke's Case* the company, in the progress of the work, had undoubtedly done some damage, wantonly and carelessly; there was, therefore, some ground for the notice. This railway has now been completed for two years, without complaint being made. Who is to determine whether the parties have a right to go before a jury? We do not admit damage. It is true that a jury may find that there has been no damage, but we say that the defendants have no right to put us to that issue. If the jury find damage, however small, we have no appeal. Sect. 145. [They cited *King v. The London Dock Company*, 5 Ad. & El. 450. *The Sutton Harbor Company v. Hitchens*, 15 Jur. 70, 1 Eng. Rep. 202.]

J. Parker, in reply. It has been argued, that if you find any transgression of the statutory powers, that forms a case for interference. Another ground is, that these acts are to be construed strictly against the company, as being the terms on which they are content to take the lands; and that is relied upon by Lord Truro in his judgment in *Gatlke's Case*. Where the company transgress the powers given them by the statute, and are likely to cause irreparable damage, it is

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true that the land owner has a right to the interference of this court, but not otherwise. *Blakemore v. The Glamorganshire Canal Company*, 1 My. & K. 154. *Frewin v. Lewis*, 4 My. & C. 249. *Pim v. Wilson*, 2 Ph. 653. This road is only an easement, and it is a different question from that of land taken. *Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472. *Hutton v. The South-western Railway Company*, 7 Hare, 259.

March 22. LORD CRANWORTH, V. C. This was a motion to dissolve an injunction which I granted on the 2d of January last. The bill stated the several acts under which the plaintiffs were incorporated, and that, under the powers thereby given to them, they proceeded to make their railway, and carried it at right angles across the road leading from the village of Streethay to a farm of the defendants, called the "Hill Cottage farm." The bill then states, that on the 12th of December, 1850, the defendants caused a notice to be served on the plaintiffs, claiming from them, under the 68th section of the Lands Clauses Act, a sum of 550*l.*, by way of compensation for the damage occasioned to their said farm by reason of the railway crossing on a road, the only road to it; and the defendants called on the company either to pay the sum of 550*l.* which they so claimed, or else to summon a jury to assess the amount of the damage. The bill then charges, that the carrying of the railway across the road in question was not an injurious affecting of the defendants' farm, within the true intent and meaning of the 68th section of the Lands Clauses Act; and it prays, among other things, an injunction restraining the defendants from taking any other proceedings under the Lands Clauses Act for settling the amount of compensation. Upon an application to me *ex parte*, I granted the injunction, in conformity with the prayer, and I did so on the authority of the case of *The London and North-western Railway Company v. Smith*, 1 Mac. & G. 216. That case appeared to me to be an authority precisely in point. There the complaint of Smith was, that the company had carried their railway across a public street, which by their act they had authority to do, and so had greatly incommoded the inhabitants of one end of the intersected street, making access to their houses much less convenient than it had theretofore been. Smith, as one of the said inhabitants, had made a claim for compensation, and given the notice for summoning a jury; and the company therefore filed their bill to restrain Smith from proceeding on his notice, on the ground, as in this case, that the act complained of was not one in respect whereof they were liable to make compensation at all. The late vice chancellor of England, in this state of things, refused an injunction; but Lord Cottenham, on appeal, granted it, and the ground of his decision was, that this court will not permit a party to put in force the power given him by the act for assessing the amount of his damage, until he has first established his legal right to some compensation, that is to say, until he has shown that the damage complained of is damage in respect of which the 68th section of the Lands Clauses Act entitles the party to redress. There is no mistake as to the grounds on which

The South Staffordshire Railway Company v. Hall.

Lord Cottenham proceeded. The course which the legislature has taken in these cases has been this: Formerly the practice was to provide, by each special act, that the party claiming compensation should call on the company to take steps for summoning the jury. If the company considered the act complained of to be one in respect of which the statute did not entitle the claimant to compensation, they refused to cause the jury to be summoned, and the remedy of the claimant was to call on the company by *mandamus* to take the necessary steps. In this proceeding the question, whether the case was or was not a case entitling the party to compensation, was judicially decided; if in the negative, the *mandamus* was refused, and there was an end of the case; if in the affirmative, a peremptory *mandamus* issued, the jury was summoned, and the amount of damage was assessed. But by the general Lands Clauses Act (whether by any previous special acts I am not sure) this course of proceeding was departed from. The legislature relieved the party claiming compensation from the necessity of applying for a *mandamus*, by enabling him to fix his own amount of damages, where damage within the meaning of the statute has been incurred, and by compelling the company to pay that amount, unless within twenty-one days they take measures for summoning the jury. Where, therefore, the company dispute both the right of the party to recover any damages and the amount claimed, the only course given to them by the statute is to proceed to summon the jury, and then, supposing the jury to assess some amount of damage as due, to refuse payment of the sum assessed, leaving the party to recover it by action. In such an action the claimant would be obliged to aver that he had sustained damage within the meaning of the statute. This averment would be traversed, and so the question of right would be determined. If the company do not dispute the amount claimed, but only deny the right of compensation at all, there they will of course refuse to summon the jury, and will leave the party to bring his action for the amount claimed, and in such an action the right will at once be tried. In this state of the law, Lord Cottenham had to decide, in the case of *The London and North-western Railway Company v. Smith*, 1 Mac. & G. 216; 13 Jur. 417, whether the company were entitled to any relief in this court, by way of injunction restricting the claimant from proceeding to compel them to summon a jury until he had first established a legal title to something, by showing that the acts complained of were such as constituted damage or injury within the meaning of the 68th section of the Lands Clauses Act. His lordship, in his judgment, after remarking that under the former state of the law the *mandamus* compelled the claimant to establish his title to relief before he put the company to the necessity of causing a jury to be summoned for assessing its amount, proceeds as follows: "Then comes an act of parliament," &c. [His lordship read the judgment.]

This decision of Lord Cottenham appeared to me to be a distinct authority in favor of the plaintiffs in the present case, and I granted an injunction accordingly; and I did so without much considering whether or not, if the matter were one untouched by authority, I should have come to the same conclusion. It was the decision

of the lord chancellor on appeal, and of course I was bound to follow it in a case where the facts seemed to me to be in principle the same. The argument on the present motion has led me to consider more attentively the principle of Lord Cottenham's decision. I must confess the most profound respect for all that proceeded from that very eminent judge, yet I cannot say that I feel convinced by his reasoning. It may be that the alteration introduced into the law, by enabling a party claiming compensation to get rid of the *mandamus*, was an unwise change; still it was the act of the legislature. A course of proceeding is chalked out, whereby a party alleging that he has suffered an infringement of a legal right is enabled, in a particular mode of legal proceeding, to obtain legal redress. He cannot get that redress without establishing his title to compensation, and the amount of damage he has sustained; and the legislature having pointed out the steps by which he is to arrive at the result, what right has this court to say to a party affected by no equity whatever, "You shall not proceed to assert your legal rights in the mode prescribed by law?" I can discover neither principle nor authority for such interference. It was contended that the decision might be supported on principles analogous to those on which this court relieves against penalties. But I do not think that argument can be supported. The ground of relief against a penalty is, that though there is a legal right to the penalty, yet the real meaning of the parties all through was, that the penalty should be a mere security for something else. Here no such questions can ever arise. The sum claimed, the company may dispute; unless they do so, they admit the amount claimed to be the fair measure of damage, if any damage has been sustained; and though it may seem that the more reasonable course would have been to compel the claimant first to establish the amount, yet I cannot think it a due exercise of the powers of this court to say, that because the legislature has obliged a party to proceed in what appears to be an inconvenient course, therefore this court will step in and compel him to proceed differently. Such an exercise of authority appears to me to be rather making than administering law.

I have felt warranted in making these remarks on a judgment, to which, as being that of a court of appeal, I should ordinarily have been bound to defer, in consequence of the recent decision of the lord chancellor in the case of *The East and West India Docks and Birmingham Railway Company v. Gattke*, 15 Jur. 261, *ante*. In that case Gattke made a claim on the company, under the 68th section, for a sum of 480*l.* as a compensation for damage alleged to have been sustained by reason of dust and dirt, occasioned by the company having damaged his goods, and by reason of his customers having been compelled, by the obstruction occasioned by the works of the company, to quit the side of the road on which the defendant's shop was situated, and to pass on the opposite side, and also by the company having stopped up a lane or passage, along which he was entitled to a right of way to the back part of his premises. Gattke having made known his claim, and served a notice on the company, calling on them to summon a jury, the company filed their bill to restrain

him from all further proceedings under his notice, on the ground that the case was not one in which, under the 68th section, he was entitled to any compensation at all. Sir James Wigram, V. C., acting on the authority of Lord Cottenham's decision, granted the injunction; but, after much consideration, the lord chancellor dissolved it; and that decision of the lord chancellor appears to me to be directly in point in the present case.

Here, as in that case, the alleged grievance is personal to the complaining party only, and not extending generally to all her majesty's subjects, as in the case before Lord Cottenham. It was argued for the company, that the 68th section applies, not to damage occasioned by the works having been made — that is to say, by the mere existence of the works — but only to such damage as was produced by the work while in the progress of execution; and here, it was said, the claim is wholly for damage occasioned by the existence of the railway as a completed work; whereas in *Gattke's Case* some part of the compensation claimed was for the annoyance produced by the works while in progress. To this argument there appear to be two answers: first, there is nothing on the face of the notice served on the plaintiffs in this case which would exclude the defendants from giving evidence of, and obtaining compensation for, damage to them during the progress of the works, as well as since the completion of the railway; and, secondly, on which I mainly rely, that the question, whether, under the 68th section, the defendants are entitled to compensation for damage resulting from the existence of the railway as a completed work, is a purely legal question, to be settled in the ordinary course of legal proceedings, without the intervention of this court. I may add further, that, if there were any validity in this distinction, the lord chancellor, in *Gattke's Case*, would not have altogether dissolved the injunction, but would have only so modified it as to make it applicable to so much only of the defendant's claim as related to the injury arising from the railway having been made; for there, as in this case, a part at least of the damage for which Gattke sought relief had been occasioned, not by the works while in progress, but by the railway having been completed; and not being able to discover any distinction in principle between this case and Gattke's, I shall certainly act on that decision, and dissolve the injunction which I granted before that case had been decided. I should probably have felt bound to take that course, even if I had not taken the same view of the law as was taken by the lord chancellor; but I do so the more readily, because I cannot but admit the force of the reasoning by which the lord chancellor has justified his judgment in that case. If there is any part of that reasoning, the weight of which I do not feel, it is the mode in which his lordship endeavors to distinguish the case before him from that before Lord Cottenham. The only distinction pointed out in the judgment is, that in Lord Cottenham's case the claimant demanded compensation for what would, in a greater degree, have entitled any one of her majesty's subjects to make a similar demand. I doubt whether this affords any real distinction in principle. In such a case it may be much more easy to

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say by anticipation that the claimant must fail in establishing a legal title to damages, than if he was proceeding on a complaint of damage affecting his own property alone. Still, what the claimant is asserting is a mere legal right; surely he is at liberty, if he can, to establish this right by the ordinary course of law.

Lord Cottenham's decision, it must be observed, does not proceed on the ground that the claimant has no legal right, and so ought not to be allowed to harass the company by vexatious proceedings. If that were a principle on which the court could act, and it had been clear that there was no legal right, then the course adopted for putting the question of right or no right into a train of legal inquiry would have been unnecessary. The decision proceeded on the assumption that there was a legal question to be decided as to the claimant's right to compensation; but this court took into its own hands the objection to obtaining the decision of a court of law on the subject, instead of leaving the claimant to establish it in his own way. I confess, therefore, that the same reasoning which led the lord chancellor to dissolve the injunction in *Gatlke's Case* must, as I should have thought, have led to a similar decision in *Smith's Case*. It is not, however, necessary to discuss this point; for if there be any validity in the only distinction pointed out by the lord chancellor as existing between the two cases, namely, that the damage complained of in the one case was a public wrong, and in the other a private injury, it is clear that the claim set up in this case ranges itself under the latter head. The damage complained of by the defendants in this case affects them, and them only; and this case, therefore, must be governed by the decision of the lord chancellor, and not by that of Lord Cottenham. I am, therefore, of opinion that the injunction must be dissolved.

[His lordship, however, thought that it was not a case for costs, as the parties had acted on a decision of the lord chancellor, and suggested, that perhaps the best remedy would be to restore the old law.]

The London and North-western Railway v. Cook was a similar case. The defendant had demurred.

His LORDSHIP gave the above-stated judgment in both cases, and allowed the demurrer in the second case.

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OWEN v. HOMAN.¹

December 12, 13, 14, and 16, 1850, and February 11, 1851.

*Principal and Surety — Agreement between Creditor and Principal —
Reservation of Remedy against Surety — Receiver.*

H. & B., partners in trade, being largely indebted to the plaintiffs, their bankers, in 1844, the plaintiffs required security for the debt. B. thereupon delivered to the plaintiffs, at various times, several joint and several promissory notes of himself and the defendant, his aunt, payable on demand. In 1848, an agreement was come to between H., B., and the plaintiffs, unknown to the defendant, and which was carried into effect by three instruments, that H. should retire from the partnership; that B. should take upon himself the partnership debts; that B. should pay the plaintiffs the partnership debt by instalments of 200*l.* a month, and give a bond conditioned for such payment, such bond to be deemed an additional or collateral security, and not a release of the previous debt; that while the instalments should be duly paid, the existing sureties should not be proceeded against, except in certain events mentioned; and it was declared, that such matters should not in any manner prejudice, annul, or otherwise affect the rights and remedies of the plaintiffs against any sureties, but all such persons should remain liable to the same extent as they would have been if the agreement had not been made or the bond given; and that the plaintiffs should not take any proceedings at law or in equity against B. so long as the instalments should be paid, unless upon certain events therein mentioned, and except at the instance of the sureties; and the plaintiffs released H. from all personal liability to the payment of the partnership debt. In 1849, B. became bankrupt, and then the plaintiffs applied to the defendant for payment of the promissory notes which she had executed. The plaintiffs now filed their bill for the purpose of obtaining payment of these securities out of certain estates which were settled to the separate use of the defendant, and for a receiver. The defendant, by her answer, set up several grounds of defence, which in equity would be good answers to the bill, but admitted the execution of the promissory notes. Lord Langdale, M. R., upon the motion of the plaintiffs, made an order for a receiver, which was now discharged:—

Held, that there was sufficient doubt, as to the effect of the several transactions in this case upon the liability of the surety, to induce the court not to interfere with the possession of the surety.

Meaning of the rule, that there must be equity confessed on the answer to entitle the plaintiffs to certain remedies.

Observations as to the effect upon the liability of the surety, by the creditor having precluded himself from suing the principal debtor except in certain events.

The reservation of the creditor's rights against the surety must be construed in subordination to what shall be found to be the general intent of the parties.

Effect of the bond given by B. upon the original simple contract debt. Can the declaration, that it was not to operate as a release, prevent the legal effect of merger under the circumstances of this case? — *Quære*.

THE facts of this case are fully stated in the lord chancellor's judgment; and the arguments of counsel are also fully referred to therein.

Roupell and Elderton, in support of the appeal, cited the following cases: *Nisbet v. Smith*, 2 Bro. C. C. 579. *Rees v. Berrington*, 2 Ves. Jun. 540. *Ex parte Gifford*, 6 Ves. 805. *English v. Darley*, 2 B. & P. 62. *Ex parte Glendinning*, Buck, 517. *Boulbee v. Stubbs*, 18 Ves. 20. *Samuell v. Howarth*, 3 Mer. 272. *Hall v. Hutchons*, 3 My. & K. 426. *Bonser v. Cox*, 4 Beav. 379. *Oakley v. Pasheller*, 10 Bligh, 548.

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Wood and Hallett, contra, on the power of a married woman to bind her separate estate by a promissory note, referred to *Bulpin v. Clarke*, 17 Ves. 365; *Murray v. Barlee*, 3 My. & K. 209; *Owens v. Dickenson*, Cr. & Ph. 48. On the subject of the continuing liability of the surety, they referred to *Eyre v. Everett*, 2 Russ. 381; *Ex parte Wilson*, 11 Ves. 410; *The Bank of Ireland v. Beresford*, 6 Dowl. 238; *Ex parte Carstairs*, Buck, 560; *Maltby v. Carstairs*, 7 B. & Cr. 737; *Nichols v. Norris*, 3 B. & Ad. 41, note; *Harrison v. Courtland*, Id. 36; *Kearsley v. Cole*, 16 M. & W. 128; *Mayhew v. Crickitt*, 2 Swanst. 185; *Mackintosh v. Wyatt*, 3 Hare, 562; *Thomas v. Courtney*, 1 B. & Al. 1; *Wright v. Simpson*, 6 Ves. 734; and to Jarm. Byth., by Sweet, vol. 3, p. 303, where it is stated that it is clearly competent to a creditor, in giving time to the principal, to reserve his remedies against the surety.

Roupell, in reply.

February 11, 1851. LORD CHANCELLOR. This case comes before the court on motion to discharge an order pronounced by the master of the rolls, referring it to the master to appoint a receiver of the rents and profits of the real and personal estates of the defendant Sarah Homan. It appears from the pleadings, that the plaintiffs claim to be holders of certain promissory notes given by the defendant Mrs. Homan, amounting to a large sum, as security for a very large debt alleged to be due to them from the firm of Bowers & Harris upon a banking account; and the object of the suit is to obtain a declaration that the rents and profits of certain premises, settled to the separate use of Mrs. Homan by an indenture of release and settlement of the 28th of November, 1836, were liable to pay to the plaintiffs the principal and interest moneys secured by the three promissory notes in the bill mentioned, and praying that such principal and interest moneys might accordingly be ordered to be raised out of such rents, and that a receiver might be appointed, and for an injunction restraining the defendants Sarah Homan and Frances Green from receiving any of the said rents and profits. The substance of the bill, so far as it is material to be stated on the present occasion, is, that Messrs. Harris & Bowers carried on trade at Worcester, under the firm of Harris, Bowers, & Co., and kept a banking account with the house now represented by the plaintiffs, (formerly styled "Farley & Co.;") that in the year 1844, Harris, Bowers, & Co. were indebted to the bankers in upwards of 7000*l.*, and that debt continued to increase up to the end of the year 1848, when it amounted to 17,448*l.*; that in the year 1844 the plaintiffs required Bowers to procure security, and that Bowers gave them a joint and several promissory note of himself and Mrs. Homan (who was the aunt of Bowers) for 1000*l.*, as security for such old debt, payable on demand; and that on various subsequent occasions they repeated their request for security, and Bowers, in like manner, brought them promissory notes, signed by himself and the defendant Mrs. Homan, payable to the house on demand; and on two occasions he brought bills of ex-

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change, drawn by himself upon the defendant, payable three months after date; and that at the end of the year 1848, they were the holders of two promissory notes, the one for 1000*l.*, given in 1844, and the other for 3000*l.*, given in January, 1848, and of one note for 500*l.*, given in 1845; and that the plaintiffs claimed of the defendant payment of the amount of those securities; that they also held two bills of exchange, dated in 1846 and 1847 respectively, that had been paid to them by Bowers — one for 500*l.*, and the other for 1000*l.*, payable three months after date; but upon those bills they made no claim, as it had been agreed with Bowers that they should be given up when the note for 3000*l.* was given. The notes for 1000*l.*, given in 1844, and for 500*l.*, given in 1845, were given as security for the existing debt; but the two bills of exchange, and the note for 3000*l.*, were given in relation as well to the old debt as to advances then required.

The bill then states various changes in the firm of the plaintiffs, and that a dissolution of the partnership between Bowers and Harris took place in December, 1848; and that Bowers traded alone till April, 1849, and then formed a new partnership with Joseph Bowers and Sarah Ann Bowers; and that such last-mentioned firm became bankrupt in August, 1849. The bill does not disclose how the debt of 17,448*l.* is constituted, whether the amount was continued as one account through various changes in the firm of the plaintiffs and Harris, Bowers, & Co., or in what other manner the amount was constituted. One observation arises upon this part of the case as stated in the bill, which excites surprise in the absence of explanation. The account was in arrear in 1844 to the extent of upwards of 7000*l.*, and the plaintiffs thought it requisite to require security; but, as far as it appears, that security fell greatly short of the amount of their debt; yet that debt continually increased, and in the middle of 1848 amounted to upwards of 11,000*l.*; but between that time and the end of the year 1848, the bill states the debt to have increased to 17,448*l.* Whether this extraordinary apparent increase was, in truth, the result of the account then being made up by posting previously outstanding items, or how otherwise, does not appear. The bill then sets forth a settlement on the marriage of Mrs. Homan, with her husband, the defendant John Homan, by which certain property, not necessary to be particularly enumerated, was settled to the separate use of Mrs. Homan during the joint lives of her husband and herself, with an absolute power of appointment by deed or will, and, in default of appointment, in trust to her next of kin according to the statute, with all necessary provisions to give Mrs. Homan the power of charging or disposing of the settled property at her discretion. The bill, after stating applications to Mrs. Homan for payment of the notes, and a refusal to pay, prays to the effect before stated.

To this bill the defendant Mrs. Homan has put in her answer, in which she sets forth the will of her first husband, Richard Harris, dated the 10th of March, 1829, under which Mrs. Homan acquired the property which was the subject of settlement upon her second marriage with Mr. Homan, and out of the rents and profits of which

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the plaintiffs claim and seek to be paid. It then states that Mrs. Homan is now eighty years of age, and that in consequence of a severe fall, which for a time deprived her of her mental faculties, her memory as to recent circumstances is enfeebled and perplexed, and that she is unable to speak to occurrences during the last fifteen years. The answer then sets forth the circumstances under which the notes, the payment of which is sought by the bill, were obtained from her; and those circumstances Mrs. Homan states to be, that Bowers, in 1844, informed her that he wished to borrow a sum of money of his bankers for a short time, for the purposes of the partnership, and requested, as a temporary security to the bank for the advance, that the defendant would join him in a note or bill for 100*l.*, and upon Bowers's promising that the partnership would pay it when due, she did consent to join him in a note or bill, which she has since ascertained is for 1000*l.* Believes that Bowers obtained an advance from the bankers on the security thereof, which advance however was debited, as she believes, to the partnership account. In about twelve months after, upon a representation that the former note or bill had been paid, and for the purpose of procuring a further advance from the bankers, Bowers induced her to join in another note or bill for 500*l.* Believes that Bowers obtained an advance from the bankers thereon, which was also debited to the partnership account. That sometime afterwards Bowers represented that the said two notes or bills had been paid, and induced her to join him again in a note or bill for 500*l.*, for the purpose of his procuring an advance of money to enable him to make large purchases of tea, at cash price. That no application was made to her for payment of either of those notes or bills, although she had called more than once at the bank, and the managing clerk at the bank had frequently visited her; and upon the representation by Bowers that all such notes or bills had been paid, she was induced to join in another note or bill for 300*l.*, as she believed, but which note or bill she is now informed is for 3000*l.*

The answer then states that the defendant believes that the bankers were fully cognizant of all the representations made by Bowers to induce her to give the notes and bills, and of their having been paid; and she believes that the two first-mentioned notes or bills had, in fact, been paid. Believes that the bankers received sums more than sufficient to pay such notes or bills. That she has recently discovered, that at the time of the then application by Bowers to her, Harris, Bowers, & Co. were largely indebted to the bankers; and she believes that it was at the suggestion of the bankers that such applications were made, and that the bankers purposely concealed the fact from her of the state of the account, that Bowers might induce her to become party to such bills or notes; and that for the same purpose they have kept the account in an unusual manner. That in December, 1848, she believes Harris, Bowers, & Co. were hopelessly insolvent, to the knowledge of the bankers, and that an arrangement was then agreed to between the plaintiffs and Harris and Bowers, without her knowledge, and which arrangement was afterwards carried into effect

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by certain deeds or instruments; and the defendant insists that she became released and discharged from all liability in respect of the said notes and bills so signed by her. And this part of the case demands serious attention; for I think it must be admitted, that so important and complicated an arrangement has never before been adopted between creditor and debtor, without the sanction of a surety, where liability was intended to be continued and relied upon.

The answer sets forth the instruments entered into between the parties to the following effect: The first instrument purports to be articles of agreement, dated the 22d of December, 1848, between Mrs. Harris of the first part, Bowers of the second part, and the plaintiffs of the third part, by which it was agreed, that Bowers should take upon himself the payment of the plaintiff's debt, which is alleged then to have amounted to 17,448*l.*, and all other partnership debts and liabilities, and that Mrs. Harris should retire from the partnership business, and that, in consideration thereof, Bowers undertook to redeem certain deeds and writings belonging to Mrs. Harris, and then held by the plaintiffs, and to allow her an annuity of 100*l.* a year until such deeds should be delivered up; and it was further agreed that Bowers should release Mrs. Harris from all liabilities, and should pay Farley & Co. the debt of 17,448*l.*, with interest, by instalments of 200*l.* a month, and that, in default of payment, the whole debt to be and become payable and recoverable; that Bowers should give a bond conditioned for such payment, such bond to be deemed an additional or collateral security only, and in no wise a release, satisfaction, or extinguishment of the debt or of the liability of Mrs. Harris, but that the debt should be payable, and liable to the same remedies as if the bond had not been taken; and that in the mean time, and while such instalments should be duly paid, the existing sureties should not be proceeded against, except in the events therein mentioned, and in those events the debts of the sureties should be immediately payable and recoverable by the bankers, who should be at liberty to proceed against the sureties; and that, in consideration of the said agreement, and the debt of the bankers being collaterally secured by Bowers's bond, and of Mrs. Harris having released her interest in the business, the plaintiffs agreed with her not to take any proceedings at law, or in equity, or in bankruptcy, against her for the recovery of their debt, except as might be necessary for the recovery of the debt against Bowers, and proceedings against Mrs. Harris jointly with Bowers for that purpose, and except that they were at liberty to call upon Mrs. Harris to execute a mortgage of certain premises therein mentioned, but such mortgage was not to contain any covenant on the part of Mrs. Harris for payment of the debt; and in case the plaintiffs should take proceedings at law against Mrs. Harris and Bowers for the purpose of recovering the debt from Bowers, it was expressly understood and agreed that no execution should be levied against Mrs. Harris or her estates; and it was agreed that the several matters therein contained should be forthwith carried out, and the expenses of Farley & Co.'s solicitors paid by Bowers; and it was thereby declared and agreed that such matters should not in any wise or in any event preju-

dice, annul, or otherwise affect the rights and remedies of the bankers against any sureties, or any persons liable upon any bills, notes, or other securities, but all such persons should remain liable thereon to the same extent and manner as they would have been if the agreement had not been made or the bond had not been given; and that the bankers should not take any proceedings at law or in equity against Bowers, so long as the monthly instalments of 200*l.* should be paid, unless upon the happening of some of the events therein mentioned, and except at the instance and request of the sureties, and except in the event of Bowers's making default in any of the terms agreed on by him.

These articles purport to have been carried into effect by three other several instruments. The first which is set forth is the bond referred to in the articles, which is in form a common money bond from Bowers to the plaintiffs, conditioned to pay 17,448*l.* by instalments of 200*l.* a month, and in case of default of one payment, the whole to become payable, and also in certain other events not material to be repeated. The second instrument is the deed of dissolution between Mrs. Harris and Bowers, by which Mrs. Harris assigns all her property and interest in the partnership effects to Bowers. The third instrument set forth is an indenture between Harris and Bowers, reciting the dissolution of partnership, and that the bankers held certain title deeds of Mrs. Harris as security for the debt due to them; and that it had been agreed, in contemplation of the said dissolution of the said copartnership, that the said bankers should release Mrs. Harris from all personal liability to the payment of the said debt of 17,448*l.*, and every part thereof; and that Bowers should enter into a bond for payment of the debt by instalments, and that if such instalments should be paid, no proceedings should in the mean time be taken against Bowers during his life; but so, nevertheless, as not to affect the equitable lien of the bankers upon the title deeds, nor Mrs. Harris's liability to execute a mortgage, which, however, should not contain or imply any personal liability upon her in respect of the said debt. This deed also contained an assignment of the partnership effects to Bowers, and a covenant by Bowers to pay the bankers.

The answer then states large receipts by the bankers, and that various changes had taken place in the persons composing the firm of the plaintiffs and the firm of the debtors. The answer then states, that until July, 1849, the defendant was altogether uninformed that Harris and Bowers were indebted to the plaintiffs. Such is the substance of the case upon the record, which it has been necessary to state in order to render the grounds of my judgment intelligible. The order now appealed against was made upon an application to the master of the rolls for the appointment of a receiver, and such application was made upon the case disclosed by the bill and answer. The application was opposed upon several grounds, which have been renewed and argued before me. As to the first ground, it is said, that to entitle the plaintiffs to the order, the answer should contain a confession of equity on the part of the plaintiffs; secondly, that the records should disclose such a reasonable probability of

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the plaintiffs' establishing their right to a decree as to entitle them to have the property secured by the appointment of a receiver; and it is insisted on the part of the defendant, that no such case appears upon the record, it being to be remembered that in considering that question the defendant's answer is entitled to credit; and this point in the case is argued upon several grounds. First, it is said that the defendant is not bound by any of the securities she has signed, by reason of their having been obtained through fraud, by misrepresentation and suppression of material circumstances; that such misrepresentation and suppression took place in collusion between the plaintiffs and Bowers; secondly, that the plaintiffs have so dealt with the principal debtors as to have discharged the defendant from all liability in respect of her suretyship, by suspending their right of suing the principal debtors, by altogether exonerating and discharging Mrs. Harris from liability to pay their debt, by having taken a bond for the whole debt due to them from Bowers, by which the remedy upon the simple contract debt became merged and extinguished as regards Bowers, and by consequence enured to the discharge of Mrs. Harris.

It is further alleged, that the answer states that the debt due to the plaintiffs, in respect to which it is sought to charge the defendant, has, in truth, been paid and satisfied, and therefore negatives any equity upon the part of the plaintiffs. Some of the points suggested do not depend upon any disputed facts, but upon the construction of certain legal instruments, and upon the law which shall be found applicable to their true effect. It will be necessary for me to remark upon several of these points, in order to render the ground intelligible upon which the conclusion is founded at which I have arrived. As to the first objection to the order, that there is no equity confessed upon the answer, I think that point cannot be sustained. The effect of the whole of the answer is to deny altogether the plaintiff's title to a decree; but such denial of title is founded altogether upon grounds within the equity jurisdiction, although some questions of law may arise incidentally. Whether there has been such misrepresentation or suppression of circumstances in obtaining the securities sought to be enforced against the defendant as ought to discharge her from her suretyship, is clearly an equitable question, although in modern times that equity has been administered at law. The question, whether the dealings between the plaintiffs and the principal debtors have discharged the surety, is likewise clearly an equitable question, although, so far as concerns the point of merger or extinguishment of the original debt in taking a bond from Bowers, it must to a considerable extent rest upon legal grounds. The remaining point connected with the account is obviously a question for equity. If the meaning of the expression, that, to entitle the plaintiffs to certain remedies, equity must be confessed in the answer, is, that the defendant must admit such circumstances as *prima facie* will entitle the plaintiffs to a decree, this answer contains no such admission, but the answer does admit that the right and obligations to be decided in the cause depend upon matters peculiarly cognizable in equity; and I adopt the view taken by *Wigram, V. C.*, in the case

of *Bentinck v. Willinck*, 2 Hare, 1, that an answer to such an effect falls within the description of an answer in which equity is confessed.

The question, therefore, to be decided upon the present occasion is, whether, upon the whole record, such a state of things appears as in the exercise of a sound discretion calls upon the court to displace the defendant from the present possession and enjoyment of her unquestionable property for the security of the plaintiffs. I must, therefore, consider the true character of such case. The first ground of defence is, that the securities were all obtained by fraud—that is, by misrepresentation, and by a suppression of material facts relative to the transactions between the plaintiffs and the principal debtors—and that the plaintiffs were in collusion with Bowers, who made such misrepresentations, and was guilty of such suppression. The bill merely states, that the plaintiffs, at the various times set forth in the bill, requested Bowers to give security for the debt then due; and in reference to future advances, it is not suggested that any communication whatever was made by the plaintiffs to Mrs. Homan, except that it is stated, in one part of the bill, that the securities were lodged by Mrs. Homan and Bowers. The answer distinctly swears to representations made by Bowers to induce the defendant to join in the notes, which the facts of the case showed to have been false. The answer states that each security was obtained upon a representation that it was required for the purpose of a present advance of money. The bill then states that the same was deposited as security for an existing debt, and without any allusion to an advance, and that two bills were deposited, partly as security for the debt then due, but also in relation to advances agreed to be made. The answer states that all the securities, after the first, were obtained upon similar representations as to the purpose to which it was to be applied, and also upon the representation that all the previous securities had been paid, and there is also a positive denial of all knowledge that any debt was due to the plaintiffs at the time those securities were obtained. The lady was seventy-five years of age, and considering that Harris & Bowers were in debt to the bankers upwards of 7000*l.* at the time the first security was obtained, and that that debt constantly increased, and that no one security obtained from the defendant was ever withdrawn up to the time of giving the last security for 3000*l.*, there does seem considerable probability, that, if the real state of the facts had been known, the defendant would have paused before giving securities in succession in the manner in which she has done; and it is to be observed, that two of the securities were payable at three months, and that neither those nor any other of the notes were ever presented to her for payment, or any intimation made to her upon the subject of the notes or the account during the four years in which the transactions took place, although she appears to have been repeatedly in communication with the bankers' managing clerk, and to have been herself at the bank. The defendant also swears to her belief that the fraudulent conduct of Bowers took place in collusion with the plaintiffs. No particular facts are stated as the foundation of that belief, and it is most probably an inference which she draws from the

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circumstance of men of business receiving securities from an old lady in the way of suretyship, of such an amount, and during so long a time, and in relation to such a state of accounts as existed between them and the debtors, without ever making any communication to her, although known to them, and their managing clerk was in the habit of visiting her. Placing no reliance upon the allegation of collusion, in the absence of specific facts being stated as a foundation for it, and attending only to such of the general facts as are undisputed, the equity on the part of the plaintiffs is not free from difficulty. Nothing turns upon the facts that the suretyship is created by promissory notes, as it has been decided that the relations and rights between the creditor and surety are the same as in cases where the suretyship is created by agreement or guaranty; and the promissory notes, it will be observed, are payable to the plaintiffs, creating therefore a direct and immediate privity. I am not aware that either the text books or the decisions distinctly define the extent of the obligation and responsibility which rest upon the creditor in regard to the surety being made acquainted with all the material circumstances connected with the transactions to which the suretyship is to be applied. The cases which are reported have generally arisen out of transactions in which there has been personal communication between the creditor and surety; and the clear law deducible from those decisions is, that the creditor must make a full, fair, and honest communication of every circumstance calculated to influence the discretion of the surety in entering into the required obligation. Lord Cranworth, while sitting as lord commissioner, well observed, that the duty of the creditor, in regard to the communication to be made to the surety, assimilated that of the assured in a policy of insurance, who, unasked, is bound to give to the underwriter all the information in his power, to enable him to estimate the character of the risk he is invited to undertake.¹

Where communication does take place between the creditor and the surety, the duty of the creditor cannot be better illustrated than by the case of the assured; but, in the case of an insurance, communication necessarily takes place between the assured, or his agent, which is the same thing, and the insurer; but such communication does not always take place between the creditor and the surety. The question arises, whether the party, through whose instrumentality the guaranty or suretyship obligation is created, is to be considered as the agent of the creditor, the party to be insured, and therefore affecting the principal; or if not, how far the validity of his security is affected, if it shall have been obtained by fraud or by misrepresentation or suppression; or, in other words, does a creditor entirely

¹ The reporter does not remember the case here alluded to by the lord chancellor, but conceives that his lordship must have had in his mind the observations of Lord Commissioner Rolfe in the case of *Dalglisch v. Jarvie*, 14 Jur. 945; s. c. 2 Mac. & G. 231, which case did not relate to the *bona fides* required between creditor and surety, but to the *bona fides* required by the court in parties coming for *ex parte* injunctions; but the same analogy would, upon principle and authorities, to a considerable extent, seem to apply to the equity discussed in the above case.

escape responsibility by desiring his debtor, or party contracting with him, to procure the suretyship contract — the creditor declining, or, at all events, abstaining from communication with the surety? In this case the bill contains no statement leading to the conclusion that any communication took place between the plaintiffs and the defendant, except that, in regard to some of the bills, it is alleged that they were delivered or deposited by the defendant and Bowers with the plaintiffs. The answer contains no statement of any communication between the plaintiffs and the defendant, beyond the allegation that the defendant was once or twice at the banking-house, and that the managing clerk frequently visited her. It does not set forth what took place upon any of those occasions affirmatively; but it expressly denies that she was ever informed of Bowers being indebted to the plaintiffs, or that any application was ever made to her until 1849 upon the subject of the notes or bills, or of the debt owing to the plaintiffs. In *Re Pidcock v. Bishop*, 3 B. & Cr. 605, there does not appear to have been any communication between the creditor and the surety; and in that case the guaranty was held to be void, in consequence of the debtor having forborne to inform a surety of a condition in the contract between the creditor and the debtor, for the performance of which the surety became bound. The case of *Pidcock v. Bishop* was a distinct decision; but there is an *obiter dictum* of a different import in *Stone v. Crompter*, 5 Bing. N. C. 142. In that case the suretyship contract was held void by reason of an alleged misrepresentation by the creditor to the surety, through his agent. But in the course of the judgment, Tindal, C. J., said, that “a creditor was not responsible for the misrepresentation or non-communication of material circumstances by the debtor, where there is no communication between the creditor and the surety.” The present occasion does not call for the expression of an opinion upon this important question; and before the hearing, the case may be relieved of the question by the evidence which may be given in the cause. It is enough, therefore, to say, at present, that the facts as they now stand present a strong probability that the defendant was induced to undertake the responsibility, sought to be enforced against her, by misrepresentations, or suppression of the important circumstances in the case; and if that fact shall remain unaltered, a very serious question as to the legal effect of such fact upon the validity of the securities must arise at the hearing.

The next point of defence relied upon in the answer is, that the defendant has, at all events, been discharged from liability upon the notes of hand by the dealings which have taken place between the plaintiffs and the principal debtors. Those dealings have been of such an important nature that I think it is not contended that they would not have discharged the surety if their effect had not been controlled by certain provisions contained in the arrangement, and inserted in the deeds expressly to exclude that consequence; and the question is, whether those provisions are effectual, in point of law and equity, for that purpose. One part of the arrangement or dealing between the debtors and the plaintiffs, which it is contended discharged the

defendant from her liability upon the notes, is, that the plaintiffs covenanted with Bowers, that, except requested by the surety to do so, and in certain other events not material to be enumerated, they, the plaintiffs, would not sue Bowers for their debt, provided he continued to pay the sum of 200*l.* every month until the whole debt of 17,448*l.* and interest should be paid and satisfied. The plaintiffs' counsel has argued, that supposing this covenant, standing alone and unqualified, would have discharged the defendant, yet that such effect is excluded by a distinct provision and agreement forming part of the same contract, and contained in the same instrument, inasmuch as there is reserved all remedies against the sureties, and a special reservation of a power to sue Bowers, if required by the surety. The general law, as administered in this court, is not disputed, that a creditor discharges a surety by any dealings or arrangement with the principal debtor, without the surety's assent, which at all varies the situation, rights, or remedies of the surety. It is, therefore, necessary to consider whether the effect of the agreements and stipulation before referred to did in any respect alter the situation of the surety, or vary her legal or equitable rights and remedies; if such was the effect, the consequence is not in dispute. In considering that question, it is material to observe that a surety undertakes his obligation with the knowledge that the creditor has the power to sue the debtor at any time at his discretion, for the common benefit and security of the creditor himself and the surety; and that discretion is open to be influenced by the varying changes which may take place in the circumstances of the debtor while the debt remains unpaid; and it may not unreasonably be argued, that the surety is deprived of the security and advantage which the existence of that power and discretion possessed by the creditor affords, if the creditor precludes himself from suing by covenanting not to sue the debtor except in certain events, those events by no means comprising all that might reasonably stimulate the creditor to sue if his power and discretion were unfettered. The surrender and exclusion of this personal power and discretion of the creditor, it may be contended, is by no means compensated by a reservation of the limited power to sue the debtor, if required so to do by the surety. A relationship exists between the creditor and debtor which renders it highly probable that the creditor may become aware of circumstances which would stimulate the exercise of the discretion to sue, but of which circumstances the surety may not become aware, and may not, therefore, know the necessity or the expediency of calling upon the creditor to sue. A surety has no ground of legal complaint that the creditor forbears to sue, unless the surety calls upon the creditor to do so; but it does not follow that he may not therefore complain that the creditor has deprived him of the benefit and security of the discretionary power which the creditor by law possessed, until he deprived himself of it by a voluntary covenant. But it may be said that the effect of the contract is not to deprive the creditor of the power of suing the debtor at law, as the covenant not to sue could not be pleaded in bar to an action for the debt, although it might subject the creditor to an action for suing contrary to the covenant. To this it may be replied,

that liability to such action has a tendency to operate and to fetter the discretion of the creditor in determining whether to sue the debtor or not. If the creditor had not fettered his discretion by the covenant, the determination or exercise of the discretion would be regulated by a consideration of the expediency of suing the debtor under any existing circumstances; but the existence of such a covenant introduces a new and important circumstance, operating upon the expediency of suing or not, because the creditor is to be supposed to be stimulated by views of his own interest merely, but, by reason of the existence of the covenant, he has to estimate the possible consequence, in point of damages, for breach of the covenant, against the possible advantage of suing; and the evil likely to result from the former may, in his estimation, outweigh the advantage to be derived from the latter; and it is not beyond doubt that the state of things created by the creditor has changed the situation of the surety, and deprived him of an advantage which he would otherwise have enjoyed. In addition, it may be remarked, that there being an express covenant not to sue but in certain events, and that entered into upon a good consideration, although such covenant could not be pleaded in bar of an action at law, it is by no means clear that the action, contrary to the covenant, might not be restrained by equity. The reservation of the remedies against the surety does not affect the view of the question I have presented. I have been considering the case in regard to the covenant not to sue Bowers, but there is an additional point as it relates to the other debtor, Mrs. Harris; all that has been said hitherto necessarily applies to her equally as to Bowers, as Mrs. Harris could only be sued for conformity when it should be right to sue Bowers. But the point peculiarly referable to Mrs. Harris is, whether, although the power is reserved to join Mrs. Harris as defendant, for conformity, in any action which might be brought against Bowers, the plaintiffs have altogether precluded themselves from enforcing payment and satisfaction of the debt by execution against her person and property. Mrs. Harris, by arrangement with the plaintiffs and Bowers, retired from the partnership, and assigned her interest in the partnership to Bowers; and, as the consideration for her so doing, the plaintiffs entered into certain covenants with her, which may give rise to a serious question of construction. It is plain that one object of the arrangement was the complete discharge of Mrs. Harris from the plaintiffs' debt, and that her connection with that debt was only preserved for the collateral security of preserving the power in certain events of suing Bowers, and of preserving the liability of the surety; and the question is, whether it is consistent with the intention of the parties, and the good faith of the contract, that Mrs. Harris should in any event be rendered liable to an execution for this partnership debt, either at the suit of the plaintiffs themselves, whether suing at the request of the surety or in exercise of their own discretion, or at the suit of the surety.

I need not, in this court, cite any authority in support of the proposition, that at law and in equity every contract is to be construed, and effect given to it, according to the intention of the parties, to be

collected from every part of the contract, and not according to any particular words or sentences to be found in it, which, taken independently, might import an intention different from that which is to be collected from the whole of the contract. A decision strongly illustrative of this principle, and which contains many authorities, is *Solly v. Forbes*, 2 Br. & B. 38, often cited for other purposes. In this case the remedy against the surety is reserved in terms as strong as any that could be devised for that purpose; but, however strong the terms of that reservation may be, they must be construed in subordination to that which shall be found to be the general intent of the parties, as collected from the whole contract; and it may be argued with considerable effect, that the general intent of the contract was, that whatever remedies might, in form, be reserved, either directly, or incidentally, or circuitously, against Mrs. Harris, such reservation was retained with other objects and views than to make her amenable to the payment of the debt by execution against her personal property, either at the suit of the plaintiff, or at the suit of the surety. Mrs. Harris might be joined in legal proceeding, for conformity; but it may be matter of very serious doubt whether it was the intention of the parties that that proceeding should be made available to enforce payment from her. This question has also two aspects. The first, in the event of the plaintiffs suing Bowers and Mrs. Harris, at the request of the surety; could the plaintiffs enforce in any such suit payment from Mrs. Harris by execution? It may be admitted, that, in terms, Mrs. Harris has not been released; and although all covenants not to sue will not always operate as a release, yet a covenant not to sue at all does enure as a release; and supposing the effect of the contract in this case to be, that the plaintiffs have altogether excluded themselves from enforcing payment or satisfaction of their debt by execution against Mrs. Harris, may not the effect be to preclude them from levying execution even at law, or at all events to prevent them in equity? Mrs. Harris might have difficulty in availing herself of the restriction at law, because the contract authorizes them, the plaintiffs, to proceed to judgment, and after judgment the defendant has no day in court to plead. But supposing the effect of the contract to be, that Mrs. Harris was never to be liable at all to pay the debt, of course Mrs. Harris might bring an action for the breach of that contract, in which she would be entitled to recover damages to the full amount of the sum levied; and it is a general rule of law, that where the full amount which a plaintiff can recover in one action may be recovered back again between the same parties in another form of action, the grounds upon which the right exists to recover the amount back again may, in order to prevent multiplicity and circuity of action, be pleaded in bar of the maintenance of the first action. Although, for the reason suggested, Mrs. Harris might have some difficulty in availing herself, in pleading, of this principle at law, it is not impossible, as the courts of law exercise a summary jurisdiction in preventing executions from being levied against good faith, that relief might be obtained by her on motion; but at all events it would be difficult to establish, that relief might not be

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obtained in equity, because in such a view of the contract the situation of the surety would be most materially affected by the loss of the equitable right of compelling the creditor to obtain, by execution, satisfaction of the debt from Mrs. Harris. It would be no answer, that the surety herself might sue Mrs. Harris, and issue execution, because the general principle, that any alteration made in the condition and rights of the surety, operates as his discharge; and, in the case supposed, the situation of the surety is materially altered. In an action by the creditor, he must be supposed to have at his command the proof of his debt, and upon that proof verdict and judgment would follow, and of course execution; but if the surety sues, the means of proof by such surety of the original debt is by no means to be presumed to be in his power, and he must be, to a certain extent, dependent upon others to establish such proof; and in the surety's action the original suretyship and payment must be added to the proof of the original debt. The remedy of the surety, therefore, as against the debtor, would be materially affected. Further, if the effect of the contract and the intention of the parties was, that payment should never be enforced against Mrs. Harris, and if an action by the creditor against the surety would subject her to that consequence, equity would probably restrain the action against the surety, and the matter, which would restrain an action by the plaintiffs against Mrs. Homan, would equally be an answer in the present suit, or, if the present suit be successful, Mrs. Homan would be entitled to sue Mrs. Harris to judgment and execution. Mrs. Harris's death has no effect upon this question. Upon an attentive consideration of the whole contract between the plaintiffs and Mrs. Harris, I do not think it by any means clear that it is consistent with the intention, of the parties, to be collected from that contract, that payment should be enforced from Mrs. Harris by execution; and it is not necessary upon this occasion to say more than that the effect of the plaintiffs' dealings with the principal debtors, upon the liability of the surety, is subject to doubt. The general position, that a discharge of the principal debtor does not relieve the surety from his liability when the remedy against the surety is reserved, seems to be considered as established at law and in equity; but I do not recollect any case where the effect has been considered of the surety being deprived of the equitable remedy of compelling the creditor to sue the debtor; or that it has ever been decided, that, under a reservation of the remedies against the surety, the creditor can maintain an action against the debtor contrary to his discharge and release, because such action was brought at the desire and for the benefit of the surety; or that the creditor depriving himself for a time of the discretion to sue or not, or still more of a release or discharge, express or implied, of the debtor, in no way prejudices or affects the rights or remedies of the surety. Assuming, for the present purpose, as the master of the rolls did assume, that it is the law of this court, that if the remedies are reserved against the surety, the liability of the surety is not discharged by an arrangement between the creditor and the debtor, which does not alter the rights and position of the surety in regard to his creditor

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or debtor, it still remains to be considered in this case, as it must in each individual case, whether the arrangement between the creditor and debtor did in law or equity affect the surety and his rights; and whether the reservation of remedy against the surety is such, as that the liability of the surety may be enforced to its full extent, consistently with the compact between the creditor and the debtor; and in this particular case I have expressed my opinion that the question is attended with considerable doubt. The remaining ground of objection is, that the plaintiffs have extinguished their right of action against the principal debtors for the original debt, by having taken a bond from Bowers for the whole of their debt. This objection has not been so much pressed before me as some of the other points, but it is not free from difficulty. It is a general rule of law, that a party, by taking or acquiring a security of a higher nature in legal operation than the one he already possesses, merges and extinguishes his legal remedies upon the minor security or cause of action; that is to say, the taking a bond or covenant, or the acquiring a judgment for a simple contract debt, merges and extinguishes the simple contract. In this case the whole debt due from Harris & Bowers to the plaintiffs was 17,448*l.*, which debt was due for money lent and money paid, and for which they held notes and bills of exchange as collateral securities. A bond was taken from Bowers for the precise amount of the whole debt. The question is, What was the legal effect or consequence of taking such bond? Was the liability of Bowers for the money paid, or upon the notes and bills, merged and extinguished by the specialty security so taken? Would that effect follow, independently of any contract or agreement to control it? The answer given to the objection is, that the parties here, by express declaration and agreement, provided that such bond should be deemed and taken to be an additional or collateral security only for the partnership debt, and should in no wise be deemed or taken to be a release, satisfaction, or extinguishment thereof, or of the liability of Mrs. Harris, and that the debt should be payable and recoverable by the same remedies as if the bond had not been taken; and the question is, if the parties have by this provision prevented the bond from operating as a merger.

There are no doubt cases which state that specialties taken for simple contract debts, upon an agreement that the same shall be taken by way of collateral security only, shall not operate to merge or extinguish the simple contract debt. Some of such cases refer to bonds given by third persons, in which case the debtor did not join; and I am not aware of any case, where a specialty has been given by a sole debtor, or one of several joint debtors, in which the legal effect of such bond, as a merger of the simple contract debt, has been controlled or defeated by the agreement of the parties; and I have some difficulty in receiving the idea, that it is competent to parties, by agreement, to control any such legal effect. I have no difficulty in understanding, that where a security is taken from a third person, and it is a question of intention whether such specialty was taken in satisfaction of the debt or as additional and collateral security, it is competent to the parties, by agreement, to state the true character of

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the transaction. But such a case stands quite independent of the principle, because in such cases there was no simple contract debt due from the third party, the remedy upon which could merge in the specialty, nor in any specialty accepted from the original debtor, to give a higher remedy to the creditor. But in this case there was a debt due upon simple contract from Bowers & Harris, and for that simple contract debt Bowers gave a specialty, and, of necessary consequence, a higher remedy; and if the simple contract remain, I see no reason why the creditor might not sue upon both, which I think would not be consistent with the general principles of law. The effect of the cases upon this subject may be somewhat uncertain. The case of *Solly v. Forbes*, 2 Br. & B. 38, has been cited as a legal determination that the effect of instruments which, in terms, purported to be releases, might be controlled, and prevented from operating, where either the parties expressly agreed that it should not do so, or the intention that it should so operate has been negatived by the whole contents of the instrument. But it must be remarked, that in *Solly v. Forbes*, and in the other cases to the same effect, it was not held that the ordinary legal effect might be restrained or precluded by the agreement of the parties, but that the instruments, being construed according to the intent of the parties, either did not amount to releases, or, as in *Solly v. Forbes*, to a qualified release only, and in other cases only to covenants not to sue; and those decisions are rather in confirmation of the general principle than otherwise. In *Twoopeny v. Young*, 3 B. & Cr. 208, the instrument pleaded in bar contained no covenant, and gave no right of action whatever, and therefore could not operate as a merger. This application of the rule of construing instruments according to the intention of the parties has greatly expanded in modern times, with the object of giving effect to instruments according to the intention of the parties, without infringing the general rules of law, namely, that rule which declares conditions are void which are repugnant to the grant or instrument; and that instruments are to be construed according to the intention of the parties, where that could be done without infringing the rules of law. The infringement of this rule is avoided by the court, in construction, rejecting the ordinary well-known legal meaning of the terms of the instruments, and ascribing a meaning to those terms, and a sense consistent with the general intent of the parties, as collected from the whole instrument. No case has been cited where, upon the whole contents of the instrument, it could operate only as a release or specialty. Its legal effect has been controlled by the agreement of the parties. The general rule is clearly laid down in all the text books, and in *Bassett v. Wood*, Litt. 17, cited in Vin. Ab., tit. "Extinguishment," B. pl. 8, where it was held, that a creditor, accepting a statute from a joint debtor, discharged the co-debtors. And in *Everard v. Hearn*, Litt. 190, reported also in 18 Vin. Ab. 352, and in Bac. Ab. tit. "Release," G. pl. 5, p. 625, that a release to one of several obligors releases all the obligors, and a proviso, that the other obligors shall not take advantage of it, is void; and to avoid that consequence it was, that in *Solly v. Forbes* the court held the instru-

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ment not to be a release. The proviso in *Bassett v. Wood* manifested beyond doubt that it was not intended the co-debtors should be discharged; but the court rejected such intention as repugnant to the rules of law, that a release of one should not enure to the discharge of all, and therefore disregarded the intention. In this case the bond is a distinct instrument given by one of the debtors to the creditors, perfect in all its parts as a bond — giving all the rights and remedies which a bond could have by law, and having no terms or conditions contained in it limiting or restraining its effect; and it has not been attempted to argue that the parties did not intend that it should operate as a bond, and be available for all legal purposes, as such, to the plaintiffs; but what they sought to accomplish was, that the plaintiffs might acquire the security and advantage of a specialty, but agree, that, by a separate independent instrument, to which the bond in no respect refers, the bond should not have the legal consequence and effect which the law imperatively attaches to it. It was to be a bond, but without the inseparable incident of extinguishing the lower remedy against the obligor for the simple contract debt; and for this purpose it is declared, not in the bond, but in a separate instrument, that the bond should be deemed a collateral security only, and that all remedies should remain for the simple contract debt as if the bond had not been taken. Whether the parties have succeeded in obtaining the benefit of the bond, and excluding the ordinary legal consequence of extinguishing the simple contract remedy, may possibly be a question at the hearing not unaccompanied with difficulty. Many of the points which have been argued before me do not appear to have been pressed upon the attention of the master of the rolls, who, notwithstanding, appears to have acceded to the application reluctantly. I am of opinion that the case upon the whole record presents too much doubt, as to the plaintiffs' right to a decree, to warrant the possession of the property being disturbed. It is unnecessary to do more than to state that the granting a receiver is a matter of discretion, to be governed by a view of the whole circumstances of the case, one most material of which circumstances is, the probability of the plaintiffs being ultimately entitled to a decree. In this case many of the important points arise upon the construction of the deeds, and not upon disputed facts; and I repeat, that, in my opinion, that construction is attended with too much doubt and difficulty to entitle the plaintiffs to a receiver. The order must, therefore, be discharged.

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*Ex parte MORRISON, in re THE OXFORD AND WORCESTER EXTENSION AND CHESTER JUNCTION RAILWAY (WITH BRANCHES TO SHREWSBURY AND NORTHWICH) COMPANY.*¹

February 8, 1851.

Joint-stock Companies Winding-up Acts — Contributory — Managing Committee-man.

P. M., a member of the managing committee of a provisionally registered railway company, had allotted to him and accepted 100 shares. At a meeting of the managing committee, at which P. M. was president, an instruction was given to the allotment committee to allot the shares according to a scheme, by which 500 shares were reserved to each member of the managing committee. A report was made by the secretary at a subsequent meeting, that the allotment committee had allotted the shares according to the scheme. No entry appeared in the allotment book of the allotment of the 500 shares to each managing committee-man. Under an order for winding up the company, the master placed the name of P. M. on the list of contributories for 100 shares, and afterwards for 500 more shares. On appeal from this decision as to the 500 shares, it was held that his name should remain for 400 of them, besides the original 100, in respect of which no appeal was made.

THIS was a motion by way of appeal from the decision of Sir George Rose, the master charged with the winding-up of the affairs of the above-mentioned company, by which the name of the appellant, Mr. Peter Morrison, had been included in the list of contributories of the company as a contributory without qualification in respect of 500 shares, and which 500 shares were a portion of a large number of shares alleged to have been reserved for the members of the managing committee of the company. The motion sought that such decision might be reversed, and that the name of the appellant might be struck out of such list of contributories in respect of these 500 shares, or that the court would make such other order in the matter as might seem right. The facts were, that Mr. Morrison was one of the promoters of the company, and with his consent was appointed a member of the provisional committee, at the first appointment of that committee. On the 11th of September, 1845, Mr. Morrison was appointed a member of the managing committee, and on the 15th of the same month he was appointed a member of the committee for engineering purposes. On the same 11th of September, 1845, an allotment committee was appointed, to superintend the allotment of shares, but of this committee Mr. Morrison was not a member. Prior to the 10th of October, 1845, 100 shares were allotted to Mr. Morrison, as a member of the company, and on the 6th of December, 1845, he executed the parliamentary contract and subscribers' agreement in respect of such shares; but he never paid any deposit thereon. At a meeting of the finance and allotment committee on the 10th of October, 1845, the two committees having voted themselves competent as a *quorum* to consider the general business of the company, it was "Resolved, that the committee of allotment be requested to make the allotment in accordance with the accompanying scheme, and that the

¹ 15 Jur. 346.

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capital of the company be reduced to 100,000 shares, in accordance therewith." The scheme contained a statement of the proposed distribution of the shares, and in it were the following entries:—

"To be issued to—

107 provisional committee, less
16 managing committee.

91 a 100 each 9100."

And—

"Reserve.	Shares.
"16 managing committee, a 500	8000
Provisional committee, a 150	13,650
Promoters	3000."

Mr. Morrison was chairman at the meeting at which the resolution before mentioned was passed. Upon the scheme was written the word "carried," and was signed with the initials of Mr. Morrison and two other members of the committee. At a meeting of the committee of management on the 21st of October, 1845, the minutes of the former meeting were confirmed, and the secretary reported that the committee of allotment had completed the allotment of the shares, and in doing so had carried out the views of the managing committee, as conveyed to them at the last meeting. The minutes of this meeting were signed by Mr. Morrison as deputy chairman. No minute book was kept by the allotment committee; but the shares allotted were entered in an allotment book, and in that book Mr. Morrison's name appeared as the allottee of 100 shares, and no more. Mr. Morrison's name was put upon the list of contributories for the 100 shares. In July, 1850, the official manager applied to the master to place Mr. Morrison's name on the list in respect of the 500 shares mentioned in the before-stated scheme; but Sir George Rose then declined to do so. The case was brought before him a second time on the 23d of November following, when, after consideration, he directed, on the 2d of December, that Mr. Morrison's name should be placed on the list of contributories in respect of the 500 shares.

Daniel, for the motion, cited *Hutton v. Upfill*, 2 H. L. C. 596; 1 Eng. Rep. 13, and *Ex parte Davis's Executors*, 15 Law T. 541.

Roundell Palmer and *Cairns*, for the official manager, supported the master's decision.

KNIGHT BRUCE, V. C. I think I must treat this as not wholly inchoate, or merely as an intended transaction, but as one that was completed. I must, upon the evidence, consider Mr. Morrison as having completely accepted the 500 shares. If Mr. Morrison was not a provisional committee-man, he was not so because he was something more. It would be frivolous, or more than frivolous, to say that what is true of a provisional committee-man with reference to *Upfill's Case*, is not also at least as true, if there can be a difference in

Ex parte Holme, in re The North of England Joint-stock Banking Company.

truth, of a managing committee-man, which Mr. Morrison was. I think, therefore, that I should truly and substantially be contradicting *Upfill's Case* if I were not to say that Mr. Morrison is to stand as a shareholder for 500 shares altogether.¹

An order was ultimately taken, that Mr. Morrison's name should stand on the list in respect of 400 of the 500 shares, and that he should pay the costs of the motion, not exceeding 20*l*.

Ex parte HOLME, in re THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY.²

March 29, 1851.

Joint-stock Companies Winding-up Acts — Transfer of Shares — Contributory.

The holder of shares in a joint-stock banking company, in January, 1847, transferred them to another person. Before the transfer, balance sheets of the accounts up to the end of 1845 and 1846 were completed, from which it was made to appear that there had been considerable profits in those years. Four months after the transfer the bank suspended payments, and subsequently an order for winding up its affairs was made. Before the master a witness was produced who had prepared the balance sheets, and who deposed that, in fact, there had been considerable losses in 1845 and 1846; but the master refused to place the transferor of the shares on the list of contributories. The official managers appealed, but the court affirmed the master's decision, holding that he was not liable for losses previous to the date of the transfer.

THIS was a motion, on behalf of the official managers of the North of England Joint-stock Banking Company, that the decision of Mr. Farrer, the master charged with the winding up of its affairs, whereby he had excluded the name of Thomas Holme from the list of contributories, as a contributory liable to contribute to the losses, if any, sustained by the company up to the 21st of January, 1847, or other the period of his ceasing to be the holder of forty-eight shares of 100*l*. each, might be reversed, and that the name of the said Thomas Holme might be inserted in the list of contributories, as a contributory liable to contribute to the losses, if any, sustained by the company up to the 21st of January, 1847, or other the period of his ceasing to be the holder of forty-eight shares of 100*l*. each in the company. The circumstances of the case will appear from the judgment of the master, which refers to the clauses of the deed of settlement relative to the transfer of shares, and to the making up of balance sheets of the affairs of the company. The former was the 26th clause, and is as follows: "Whenever, by any means whatsoever, any shares shall become actually forfeited, or shall be duly and effectually transferred to a new

¹ There was a good deal of complication in the statement of the case. Mr. Morrison's name appeared, in fact, for 600 shares, (namely, the 100 and the 500;) and the court, during the argument, seemed to intimate an opinion that the whole transaction was intended as one, and that, in fact, the 100 was intended to be included in the larger number.

² 15 Jur. 347.

Ex parte Holme, in re The North of England Joint-stock Banking Company.

holder, then and in such case, and not before, the responsibility of the previous holder, as a member of the company in respect of such shares, shall (so far as the law will in that behalf allow) cease and determine, and such previous holder shall be exonerated and released from all subsequent claims, demands, and obligations in respect of the same shares, and from all future observance and performance of the covenants, conditions, stipulations, and agreements in the deed of settlement contained in respect of the same shares; provided nevertheless, that nothing in this article contained shall extend, or be construed to extend, to release the previous holder of shares so forfeited or transferred as aforesaid from his proportion of the losses, if any, sustained by the company up to the period of his ceasing to be such holder as aforesaid." The clause 45, respecting the balance sheets, is this: "At every half-yearly general meeting of the company, the directors shall exhibit to the shareholders assembled such a balance sheet as they are required to prepare by the 69th article of these presents, and such a statement of the probable amount of the losses to be apprehended from the subsisting accounts or engagements of or with the company, and generally of the state and progress of the affairs of the company up to the 30th day of June and the 31st day of December immediately preceding such meeting, as the directors shall deem expedient for the interest of the company to be made public; and every such balance sheet shall be binding and conclusive on all the shareholders, their executors, administrators, and assigns, unless some error shall be discovered therein respectively before the next half-yearly general meeting, and in that case such error only shall be rectified." The judgment of the master was dated on the 28th of January, 1851, and was as follows: "Application of the official managers to include Thomas Holme, as liable to losses under the 26th article of the deed of settlement. Thomas Holme signed the deed of settlement in respect of shares amounting to thirty, and subsequently he acquired eighteen other shares. On the 21st of January, 1847, he transferred these forty-eight shares to Mary Aitchison, having received dividends or profits which became payable up to that day. The sum of 255*l.* 14*s.* has been paid by Mrs. Aitchison on account of the calls made under this reference; and Samuel Hedley, by his affidavit, swears, 'that he has been informed and believes that Mary Aitchison is totally unable to make any further payment on account of the said calls, or either of them.'

"Under these circumstances the official manager applies to include the transferrer, Thomas Holme, as liable to losses under the proviso in the 26th article of the deed, 'that nothing in this article contained shall extend, or be construed to extend, to release the previous holder of shares so forfeited or transferred as aforesaid from his proportion of the losses, if any, sustained by the company up to the period of his ceasing to be such holder as aforesaid.' In *Hawthorn's Case*, 13 Jur. 77, 158, he was included in the list as liable in respect of losses, if any, sustained by the company up to the period of his ceasing to be a holder of shares; but in the present case, Mr. Holme resists being included at all, upon the ground that at the time

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he ceased to be a shareholder the company had not incurred any losses; and in support of that proposition he relies upon the reports of the directors, and mainly upon two balance sheets; one is for the year ending the 31st of December, 1845, by which it is made to appear that there was profit for that year amounting to 9773*l.* 1*s.* 11*d.*, out of which a half-year's dividends, amounting to 3732*l.* 14*s.* 3*d.*, were paid; the other is for the year ending the 31st of December, 1846, by which it is made to appear that there was a profit for that year amounting to 12421*l.* 10*s.* 4*d.*, out of which a half-year's dividends, amounting also to 3732*l.* 14*s.* 3*d.*, were paid. Messrs. Holme and Dees have filed a joint affidavit. It is argued on behalf of Mr. Holme, that these balance sheets are, by the terms of the deed of settlement, conclusive as to the state of the affairs of the bank at the conclusion of the years 1845 and 1846. The official managers insist that they are not conclusive, and that they have a right to show that, in fact, the company, on and prior to the 21st of January, 1847, had incurred very heavy losses, and for that purpose they have filed an affidavit sworn by Samuel Hedley, who at the opening of the bank was appointed cashier, in March, 1835, succeeded to the office of manager, and in May, 1846, became managing director, and so continued until the stoppage of the bank, or till the order of reference to me, and is now employed by the official managers as a clerk in assisting them in winding up his company's affairs. This person, who, as I understand, prepared the two balance sheets which I have referred to, now, by his affidavit, states, that if the truth had been told in 1845 and 1846, it would have appeared that the bank had at that time incurred enormous losses, and that, therefore, the representations so made were in substance false. That may be so, but for the purpose of the present application I shall give so much weight to the balance sheets which he prepared as to consider that Mr. Holme has, *prima facie*, shown that no losses had been sustained when he ceased to be a shareholder, and, therefore, I shall not include him in the list of contributories, subject, of course, to the right of the official managers to apply again, when they may be in a situation to show that losses, in fact, had been sustained on the 21st of January, 1847; but to establish that result, it will be necessary to do much more than file an affidavit sworn by the aforesaid Samuel Hedley. J. W. Farrer. January 28, 1851."

Bacon, for the motion, relied on the definition of the word "contributory" in the Winding-up Act of 1848, as conclusive of the liability of Mr. Holme. *Hawthorn's Case*, 1 De G. & S. 571, 1 Mac. & G. 49, sustained the same view.

[*Knight Bruce*, V. C. If I put Mr. Holme's name on the list, I should be saying that what the shareholders have done is not conclusive upon them as between themselves and Mr. Holme.]

But Mr. Holme was a shareholder when those representations of the accounts contained in the balance sheets were made, and it can never be said that he is to be exempt from the consequences by the

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mere fact of having shifted, as he hoped, his liability to the shoulders of another person.

J. V. Prior, on the same side. If the balance sheets are to be considered as conclusive, it will appear that all the enormous losses of the bank took place between the last of the two accounts and the day of the stoppage of its business; that is, between the end of 1846 and the 9th of March, 1847. Such a state of circumstances is, if not wholly incredible, hardly possible; while, notwithstanding the state of the affairs of the bank being generally involved, it is quite consistent that in these particular years, 1845 and 1846, there might have been a profit. There must, however, have been losses long before March, 1847, or the enormous deficit at that time could not be accounted for. Losses generally might well be, while profits might be made at particular times. *Oldaker v. Lavender*, 6 Sim. 239.

Roundell Palmer and Bates, for Mr. Holme, were not called on.

Knight Bruce, V. C. This gentleman is not liable for any loss incurred after he ceased to be a shareholder; and I conceive that the mere possibility that there may have been a loss sustained before he ceased to be a shareholder does not give a right to place his name on the list. I am of opinion that it must be proved of persons so situated, and in such circumstances, that there had been a loss sustained before the period in question. Mr. Prior has sensibly observed, that it is almost an irresistible inference, from the nature of the evidence, that there must have been such losses at the particular period in question, by the stoppage which so soon occurred and the lamentable wreck which ensued. There would, however, be more force in that, I think, but for the circumstance I am about to mention, namely, that between these disputants, for the present purpose, the balance sheet immediately before, and the balance sheet immediately after, the time Mr. Holme ceased to be a proprietor, must be taken to be conclusive; that is, I repeat, as between the disputants and for the present purpose. I cannot say that, in my opinion, a case has been shown for Mr. Holme's name being put on the list of contributors. I agree with the master in paying no attention to Mr. Hedley's affidavit. The motion must be refused with costs.

Vaughan v. Buck.

VAUGHAN v. BUCK.¹

February 21, and April 15, 1851.

Equity to Settlement.

An order had been made for payment of the wife's life income of a fund in court to the husband, with liberty to apply. The husband separated from his wife, and became bankrupt. The husband having besides received a considerable sum, two thirds of the income were directed to be paid to the wife, the other third to the assignees of the husband.

HENRY WILLIAM VAUGHAN, by his will dated the 12th of May, 1830, willed and bequeathed to his beloved wife, Elizabeth Vaughan, the whole of his property during her natural life, and after to be equally divided between his surviving children. He then gave certain legacies to his children, and left to his wife a certain house, and 1000*l.* in the New 4*l.* per Cents., 1500*l.* in the 3*l.* per Cent. Consols, 645*l.* in the Reduced 3*l.* per Cent. Annuities, and 30*l.* per annum in the Long Annuities. All this he gave to his wife, with the residue and interest, should there be any. The testator died in March, 1838, and letters of administration with the will annexed were granted to the widow. In addition to the property mentioned in the will, the widow became entitled to 2000*l.* Consols, which had been purchased by the testator in their joint names. In December, 1839, the widow married William James Buck, without any settlement being made. William James Buck had no property which could be settled. In 1840, a suit was instituted by the children of the first marriage, and 5600*l.* Consols, 1500*l.* New 3*l.* 10*s.* per Cents., 1590*l.* Reduced, and 24*l.* Long Annuities, were transferred into court by Buck and his wife, and several orders were made in the matter; and by an order made on the 22d of April, 1843, it was ordered, that after payment thereof of certain costs, the residue of the cash then in court, and the dividends from time to time to accrue due on the above-mentioned sums, should, as and when the same should become due, be paid to the said William James Buck during the life of Elizabeth Buck; and any of the parties were to be at liberty to apply to the court as there should be occasion. It appears, from the report of this case in 13 Sim. 404, that the husband had then ill treated his wife, and maintained her in a manner inadequate to her fortune, though they were living together. In pursuance of this order, the dividends, amounting to about 270*l.* a year, were duly paid to the husband till April, 1850. In June, 1850, he was declared a bankrupt. The wife now presented her petition, stating as above stated, and that Buck had for some time past ceased to live with her, and had not contributed any thing towards her maintenance; that she was now resident in lodgings in very distressed circumstances, and in great pecuniary distress; and the petition prayed that the dividends might for the future be paid to her for her separate use, or that out of the

¹ 15 Jur. 348.

Vaughan v. Buck.

funds in court a settlement might be made to her separate use. Buck's assignees also presented a petition for payment of the dividends to them, and both petitions came on together. It was stated at the bar that Buck had, besides the income, received 2000*l.* of his wife's money, derived from her former husband.

Stuart and *Steere*, for Mrs. Buck, cited *Gardner v. Marshall*, 14 Sim. 575. *Green v. Otte*, 1 Sim. & S. 250. *Gilchrist v. Cator*, 1 De G. & S. 188. *Williams v. Callow*, 2 Vern. 752. *Oxenden v. Oxenden*, Id. 493. *Sturgis v. Champneys*, 5 My. & C. 97; Macq. H. & W. 57. *Elliott v. Cordell*, 5 Mad. 149.

Bethell and *Cole*, for the assignees. The wife was in possession of all this property at the time of the marriage, and it then vested in her husband; and all the court has to do is to pay it to the party entitled. When property accrues to the wife after marriage, it is different, and the court requires her consent before it can pass to the husband; and if the husband has deserted her, and become bankrupt, and his assignees apply to the court to get moneys outstanding, the court will impose terms. Here, however, the husband did not require the assistance of the court to get the money; it was in his power at the time the suit was instituted. The court is not exercising an equitable jurisdiction here, but is simply the holder of the fund. *Beresford v. Hobson*, 1 Mad. 363. There is no case in which the court held the fund; and the assignee, coming only for a formal order, has been obliged to make a settlement. *Freeman v. Fairlie*, 11 Jur. 457. *Oswell v. Probert*, 2 Ves. Jun. 680. The order of 1848 must be removed before the wife can apply. The assignees are proceeding against the husband only, and ask for whatever he is entitled to receive. The husband might continue to receive this, and pay it over to the assignees, if they chose to allow him to do so.

Rogers, for the husband.

Stuart, in reply. If this was in the hands of a third party, the court would be the administrator of it, with the equities attached. The principle on which the husband is entitled to receive the wife's property is, that he maintains her; that is the consideration he gives; and when he fails to do so, the consideration fails. *Wilkinson v. Charlesworth*, 11 Jur. 644; 10 Beav. 470. At law, all the property is absolutely the husband's, but this court will not give it to him unless he makes some provision to prevent her from starving.

LORD CRANWORTH, V. C. I cannot think that I shall accede to the proposition of Mr. Bethell in its integrity, that the doctrine applies only to after-acquired property, though it will not apply to property which has got into the sole control of the husband. The main question is, What is the effect of that order? If it had been an order declaring the husband entitled to a life interest during the life of the wife, then Mr. Bethell would be right in saying that the fact of the assignees

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having to get it through a petition would not have much effect. But the question is, whether the true meaning of the vice chancellor of England's order was not this — that there being a fund which the wife was entitled to for life, it should, until further order, be paid to the husband; and then, when the state of circumstances no longer exists, the court will interfere, and give to the wife the whole or a portion.

April 15, 1851. LORD CRANWORTH, V. C., after stating the case, said: My decision will be founded on very short and intelligible principles. It is clear that the court does not deal with a fund to which a married woman is entitled for life upon the same principles as are applicable to the case of absolute property. The husband is only entitled to it upon making a settlement, on what terms it is impossible to define, but more or less is always given for the benefit of the wife. Not so if the wife is entitled to a life interest merely. The court, considering it as the fund out of which the husband and wife are to be together maintained, and the husband maintaining the wife, the practice is to order the fund to be paid to him. That was the principle on which the court has acted, that the husband maintaining the wife was entitled to the whole income. This was a strong case, for it appeared, on the former application, that the husband was in very embarrassed circumstances; but his honor then thought, that, so long as he maintained the wife while living with him, he was entitled to receive the dividends for life. Now, how is that varied by the circumstance that the husband has become bankrupt? It appears to me completely varied. The order was that the income, as it should become due, was to be paid to the husband during the life of the wife, and any of the parties were to be at liberty to apply to the court as there should be occasion. If the circumstances altered, then any party is to be at liberty to apply to have such an order made as would have been made in 1841, if the circumstances had been so then. All I have to do is to ascertain whether any settlement has been made. It was stated as a fact that there was none. Then the only course is, that a certain portion goes to one, and a certain portion to the other; and that is the invariable practice. The fact, that the husband has already received 2000*l.*, will make the case more favorable to the wife; but I do not know that I can direct the whole to be paid to her. I might direct a reference, but I see the court has sometimes, by arrangement, made an order for a certain portion to be settled. Acting, therefore, somewhat as an arbitrator, if no part had been possessed by the husband, I should say half and half; but I think that two thirds should go to the use of the married woman, and one third to the assignees.

Wilson v. Wilson.

WILSON v. WILSON.¹

March 20, and April 16, 1861.

Will — Accumulation.

A direction to accumulate is only valid for one of the periods mentioned in the Thellusson Act.

JOHN THOMAS, by his will, dated the 15th of June, 1825, gave to trustees the residue of his personal estate, upon trust to invest the same, and out of the annual produce to pay to Thomas Rogers Wilson, the eldest son of his son Moses Wilson, after the said Thomas Rogers Wilson should have attained the age of twenty-one, and until he should have attained the age of twenty-five, an annuity of 100*l.*; and after the said Thomas Rogers Wilson should have attained the age of twenty-five, upon trust to pay to Thomas Rogers Wilson for life an annuity of 500*l.*; and, subject to the trusts thereinbefore thereof declared, he directed that the trust moneys, stocks, funds, and securities in which the investment had been made should be in trust for the first son of the said Thomas Rogers Wilson who should live to attain the age of twenty-one years; and that in case the said Thomas Rogers Wilson should have no son who should live to attain the age of twenty-one years, then from and after the decease of the said Thomas Rogers Wilson, or the decease or respective deceases of his son or all his sons under the age of twenty-one years, which should first happen, (similar trusts were declared concerning the second son of Moses Wilson, and so on for the whole six sons of Moses Wilson;) and in case Septimus Wilson, the last of the sons, should have no son who should live to attain the age of twenty-one years, then from and after the decease of the said Septimus Wilson, or the decease or respective deceases of his son or all his sons under the age of twenty-one years, whichever should last happen, the said trust moneys, stocks, funds, and securities should be in trust for the testator's own legal personal representatives. The will then contained the following clause: "Provided always, and I do hereby declare and direct, that no annuity hereinbefore given shall commence or be payable to any of the brothers of the said Thomas Rogers Wilson until after the decease or respective deceases, and such failure of issue male as aforesaid, of his elder brother or elder brothers, notwithstanding that he shall previously have attained his age of twenty-one or twenty-five years. And I do hereby declare and direct, that my said trustees do and shall, for the term of twenty-one years from the time of my decease, receive the interest, dividends, and annual proceeds of the said trust moneys, stocks, funds, and securities, and lay out and invest the same, after payment thereof of the annuity, if any, which for the time being shall be payable thereout under the trust aforesaid, in their names, in some or one of the government

¹ 15 Jur. 349.

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stocks or funds of Great Britain, or upon real securities in England or Wales, at interest; and do and shall alter, vary, and transpose such stocks, funds, and securities, for other of the same or the like nature, from time to time, as often as they, my said trustees, shall think proper, or there shall be occasion, until the moneys thereon to be invested shall become payable or transferable by virtue of the trusts and directions of this my will; and do and shall receive the interest, dividends, and annual proceeds of the last-mentioned stocks, funds, and securities, and lay out and invest the same at interest, in their names, in or upon the like stocks, funds, or securities, in order and so that the same interest, dividends, and annual proceeds, stocks, funds, and securities, and the resulting income and produce thereof, may, from time to time, for and during the term of twenty-one years from the time of my decease, accumulate in the nature of compound interest, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding, and notwithstanding the fund, from which the said accumulations or any part thereof shall proceed, shall, prior to the determination of the said term of twenty-one years from my decease, have become vested under the trusts hereinbefore thereof declared. And I do hereby declare and direct, that the said interest, dividends, and annual proceeds, stocks, funds, and securities, and the resulting income and produce thereof respectively, and the accumulations thereof respectively, shall belong to and be in trust for the person or persons who, by virtue of the trusts hereinbefore declared, shall become entitled to the fund from which such accumulations shall proceed, and be considered as part thereof. Provided always, and I do hereby also declare and direct, that from and after the expiration of the said term of twenty-one years from the time of my decease, during which such accumulations as aforesaid are directed to be made, and thenceforth during the minority or respective minorities of any person or persons who for the time being shall be entitled to the then expectant vested interest in the fund from which such accumulations shall proceed, my said trustees do and shall receive the interest, dividends, and annual proceeds of the said several trust moneys, stocks, funds, and securities hereinbefore mentioned, and the accumulations thereof respectively, and lay out and invest the same, after payment thereof of the annuity, if any, which for the time being shall be payable thereout under the trusts aforesaid, in their names, in some or one of the government stocks or funds, or upon real securities in England or Wales, at interest; and do and shall alter, vary, and transpose such stocks, funds, and securities for others of the same or the like nature, from time to time, as often as they, my said trustees, shall think proper, or there shall be occasion, until the moneys thereon to be invested shall become payable or transferable by virtue of the trusts and directions of this my will; and do and shall receive the interest, dividends, and annual proceeds of the last-mentioned stocks, funds, and securities, and lay out and invest the same at interest, in their names, in or upon the like stocks, funds, and securities, in order and so that the same interest, dividends, and annual proceeds, stocks, funds, and securities, and the resulting

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income and produce thereof, may, from time to time, during the minority or respective minorities of any such person or persons as hereinbefore mentioned, accumulate in the nature of compound interest. And I do hereby declare and direct, that the said interest, dividends, and annual proceeds, stocks, funds, and securities respectively, and the resulting income and produce thereof respectively, and the accumulations thereof respectively which shall be received or arise and accumulate under the proviso last hereinbefore contained, shall respectively belong to and be in trust for the person or respective persons during whose minority or respective minorities the same shall respectively be so received or arise and accumulate." The testator died in 1828, leaving his son, Moses Wilson, his sole next of kin, and Thomas Rogers Wilson, and the other five sons of Moses Wilson, him surviving. The trustees paid the annuities and made the accumulations as directed by the will. In 1834, Thomas Rogers Wilson married, and afterwards had a son, John Wilson Wilson; and in 1844 Moses Wilson died; and the question argued was between John Wilson Wilson, who claimed the accumulations directed to be made by the will during the minorities, after the expiration of twenty-one years from the testator's death, under the will, and the representatives of Moses Wilson, as next of kin of the testator, who claimed the accumulations on the ground that the direction to accumulate beyond twenty-one years was void.

Bethell and *Elmsley*, for the personal representatives of Moses Wilson. We admit that John Wilson Wilson took as much under the will as the testator could give him; but we say that the testator could not direct these accumulations to be made. The stat. 39 & 40 Geo. 3, c. 98, says, "that no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, and profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of the grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, deviser, or testator, or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mère* at the time of the death of the grantor, deviser, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce of such property so directed to be accumulated." And it has been long ago decided that only one of the periods there mentioned can be selected for accumulation. *Griffiths v. Vere*, 9 Ves. 127. *Ware v. Polhill*, 11 Ves. 257. *Southampton v. Hertford*, 2 V. & B. 54. *Marshall v. Holloway*, 2 Swans. 432. *Broune v. Stoughton*, 14 Sim. 369. *Roslyn's Trust*, 16 Sim. 391; 13 Jur. 27. *Trickey v. Trickey*, 3 My. & K. 560.

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Rolt and Cox, for John Wilson Wilson. This is a perfectly good direction to accumulate. The point has never arisen before. In the cases cited the whole trusts were void; here every thing is good, except perhaps the direction to accumulate. The statute gives four periods for accumulation, and, as we contend, the accumulation is not limited to one of those periods. If it were not for that statute, the accumulation could be made. And Lord Eldon thought the act would not effect its purpose, and that the law would accumulate for more than twenty-one years; *Griffiths v. Vere*, 9 Ves. 127; and in fact you may accumulate for a longer period for the benefit of an infant. The object of the statute was to prevent property from being withdrawn from enjoyment for too long a period; but where there is an infant it is impossible to avoid it; in fact, the maintenance of the infant is the enjoyment. We say that a testator may select more than one of the periods allowed by the statute, and that the word "or" is distributive.

[*Lord Cranworth*, V. C. The accumulation prohibited by the statute is where it would deprive mankind of the benefit of the property. In the case of an infant it is different. The infant enjoys the benefit in the only mode in which he can; if it is required for his maintenance, it is taken for that purpose.] *Haley v. Bannister*, 4 Mad. 275. *Longden v. Simpson*, 12 Ves. 295. *Elkiss v. Maxwell*, 3 Beav. 587; 12 Beav. 104. Hargrave on the *Thellusson Act*. 1 Jarm. Wills, 241.

Glasse, for other parties.

LORD CRANWORTH, V. C., (after stating the case.) The accumulation directed for the twenty-one years has been duly made, and the question is, whether the further accumulation directed during the minority of the son of Thomas Rogers Wilson is also valid, and this depends on the single short point, whether the *Thellusson Act*, as it is called, 39 & 40 Geo. 3, c. 98, which restrains accumulations except within certain limited periods, confines it to only one of the allowed periods, to be selected by the settlor or testator, or permits it to endure during all of them. This, I think, must be decided solely by attending to the strict grammatical construction of the act. Before the passing of that act there was no limit to the right of accumulation except that which applied to all executory trusts. The statute says, that it is expedient to make the right of accumulating, and so postponing the beneficial enjoyment of property, subject to the restrictions thereafter contained, and then enacts as follows: [His lordship read the act.] The line thus drawn is altogether arbitrary, and there is no clew whatever enabling us to say what liberty of accumulation was meant to be left unaffected, except the words of enactment themselves. Whatever the ordinary grammatical meaning of these words will be, is as completely consistent with the expressed intention of the act as any other construction on which the court might speculate, as being more likely to have been the real meaning of those who framed the clause.

Under these circumstances, I do not feel myself warranted in doing more than construing the words according to their plain grammatical import; and I own it seems to me to be quite clear, that, by so proceeding, only one of the permitted periods can be taken. The act says, it is expedient that the power of accumulation shall be restricted in manner hereinafter mentioned; that is, no rents or profits of real or personal property shall be accumulated for any longer term than period A, or period B, or period C, or period D. Surely an accumulation during period B, and at the end of that period a further accumulation during period D, is an accumulation beyond any permitted period. The defendants would read the act as if it had restrained accumulation beyond periods A, B, C, and D, not reading the word "or," in its ordinary designative sense, but as a copulative. This, however, is taking a liberty with language which, I apprehend, is never done; certainly not in the modern times, where there is nothing in the context showing that to have been the sense in which the word had been used. It is admitted that there is no authority directly in point; but, in the absence of direct authority, I think the observations of Lord Eldon in *Griffiths v. Vere*, 9 Ves. 127, are entitled to very great weight. The scope of his observations there was, that, in spite of the act, accumulation might go on, partly under the act and partly under the general principles of law, for nearly double the period of twenty-one years; and he adds, that the legislature did not mean that; that is to say, though the legislature has restricted accumulation to a period of twenty-one years from the death of the testator, yet general principles of law may carry it through a far longer period. This, surely, is very strong to show that Lord Eldon's opinion was, that the statutable accumulation, if it may be so designated, must have stopped at the end of twenty-one years, otherwise he would have pointed out the subsequent accumulation, which, according to the argument before me, might go on, consistently with the statute, for a succession of minorities, after the expiration of the twenty-one years. I must, however, add, that I do not found my judgment on that case. I proceed entirely on these considerations—that the ordinary grammatical construction of the act restricts the accumulation to one only of the allowed periods; that there is nothing on the face of the act showing that the ordinary construction of the words is not to be adopted; and that such a construction leads to no absurdity or inconsistency. I am, therefore, of opinion that the direction to accumulate during the minority of the son, and the subsequent gift of the fund so accumulated, are void; and therefore that the annual produce during such minority is undisposed of, and goes to the next of kin.

LORD CRANWORTH, V. C., subsequently observed, It has been said that it would be an absurdity, that a man could not direct accumulation during his own life and twenty-one years afterwards. I think it is quite reasonable that the public should not be kept out of the enjoyment during that period.

In re Collins's Charity and of the London and Birmingham Railway Act.

***In re COLLINS'S CHARITY AND OF THE LONDON AND BIRMINGHAM RAILWAY ACT.*¹**

February 15, 1851.

Railway Company — Purchase Money of Land — Trustees — Payment of Dividends.

A part of some lands, which had been vested in trustees under the Municipal Corporations Act, was taken by a railway company, and the purchase money was paid into court. Order made for the investment in consols, and the payment of the dividends to any two of the trustees for the time being.

A RAILWAY company took, for the purposes of their act, a part of some charity lands, which had been vested in the old corporation of Coventry, and were afterwards conveyed to trustees under the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, and the purchase money was paid into court.

This was the petition of the trustees, praying that the purchase money might be invested in consols, and that the dividends might be paid to any two of the present trustees, or any two of the trustees for the time being.

Mr. W. W. Cooper, for the petition.

Knight Bruce, V. C., said that he doubted whether the order could be taken in that form, and asked if there were any precedents of such orders.

On a subsequent part of the day, *Mr. W. W. Cooper* mentioned the following cases, in which similar orders had been made: *In the Matter of the Trustees for executing the Act for improving the Public Roads in and through the City of Coventry*, Rolls, 24th of March, 1814. *In the Matter of Samuel Billing's Charities and Estates*, Vice Chancellor of England, 8th of December, 1848. *In the Matter of the Bablake Boys' Charities and the 5 & 6 Will. 4, c. 76*, Vice Chancellor of England, 9th of February, 1849.

Knight Bruce, V. C., said that he would follow the authorities which had been produced, and made the order accordingly.

¹ 20 Law J. Rep. (n. s.) Chanc. 168.

In re Harrold. — Munt v. The Shrewsbury and Chester Railway Company.

*In re HARROLD.*¹

February 26, 1851.

Practice — Motion — Stat. 13 & 14 Vict. c. 35 — Reference to the Master as to Debts.

A motion under the 19th section of the 13 & 14 Vict. c. 35, for a reference to the master to take an account of the debts of a deceased person, must be made in court.

By the 13 & 14 Vict. c. 35, s. 19, it is enacted "That it shall be lawful for the court, upon the application of the executors or administrators of any deceased person, by order to be made upon *motion or petition of course*, and to be in the form or to the effect therein mentioned, to refer it to one of the masters to take an account of the debts, &c., of a deceased person, and to report thereon."

A motion under this section, supported by affidavits, having been presented to one of the registrars, at his office, he declined to draw up the order, on the ground that the matter ought to have been mentioned to the court.

Mr. Campbell now stated the question to the court, and said that, as the words of the act were "motion of course," it was considered that the motion ought not to be made in court.

KNIGHT BRUCE, V. C., said, that he thought the registrar was right, and that the words "of course" must be taken to mean that the motion did not require service.

Mr. Campbell then made the motion, and, the affidavits being correct, an order was made accordingly.

MUNT v. THE SHREWSBURY AND CHESTER RAILWAY COMPANY.²

April 6 and 19, and July 16, 1850.

Railway Company — Capital — Misapplication — Purposes not within the Powers — Injunction.

The Shrewsbury and Chester Railway Company were, by various acts of Parliament, empowered to make several railways, and also to build wharves and warehouses for the purposes of the traffic of the company on the banks of the River Dee, the conservancy of which was vested in other persons. The railway company brought a bill into Parliament to preserve and improve the navigation of the river, though it had no power to apply any of the capital of the company for that purpose. Upon a bill filed by one shareholder:—

Held, that the directors of the railway company could not legally apply any of the railway capital in payment of the expenses of preparing, prosecuting, or promoting the bill in Parliament, or for any other purpose not authorized by the acts of the railway company, and an injunction was granted to restrain them from so doing.

¹ 20 Law J. Rep. (N. S.) Chanc. 168.

² 20 Law J. Rep. (N. S.) Chanc. 169.

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THIS bill was filed by William Munt, a shareholder in the Shrewsbury and Chester Railway Company, on behalf of himself and all other shareholders, except the directors, who were defendants, and such of the shareholders as were represented by them, against the company and the directors. It stated the 7 & 8 Vict. c. 99, incorporating the company for making a railway from the River Dee, in the county of the city of Chester, to Wrexham, in the county of Denbigh, to be called "The North Wales Mineral Railway," and declaring that the capital should amount to 120,000*l.*, to be divided into 6000 shares, of 20*l.* each. It then set out the 50th, 51st, 52d, 53d, 93d, 226th, and 227th sections of the act.

The bill then stated the 8 & 9 Vict. c. 42, incorporating a company for making a railway from Shrewsbury, in the county of Salop, to Ruabon, in the county of Denbigh, to be called "The Shrewsbury, Oswestry, and Chester Junction Railway." It incorporated the Companies Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845; and enacted that the capital of the company should be 410,000*l.*, to be divided into 20,500 shares, of 20*l.* each.

The bill then stated the 8 & 9 Vict. c. 115, authorizing the North Wales Mineral Railway Company to extend their line to Ruabon, and to make a branch railway from Rhos Robin to Minera, and to raise additional capital for those purposes, to be called "The North Wales Mineral Railway Extension Act, 1845," and to raise an additional capital of 150,000*l.*, in 15,000 shares of 10*l.* each.

The bill then stated the 9 & 10 Vict. c. 250, authorizing the North Wales Mineral Railway Company to make certain branches, and also to make a deviation in their present line of railway, to be called "The North Wales Mineral Railway Deviation and Branches Act, 1846," and empowering them to raise a capital not exceeding 6000*l.*, in 600 shares of 10*l.* each. That the 9 & 10 Vict. c. 274, authorized the Shrewsbury, Oswestry, and Chester Junction Railway Company to make railways to Crickheath and Wem, and to raise additional capital for those purposes, and declared that it should be called "The Shrewsbury, Oswestry, and Chester Junction Railway (Crickheath and Wem Branches) Act, 1846." It empowered them to raise 240,000*l.*, in 24,000 shares of 10*l.* each. That the 9 & 10 Vict. c. 275, authorized the Shrewsbury, Oswestry, and Chester Junction Railway Company to make an extension into Shrewsbury, and certain alterations and deviations in their line of railway, and that it should be called "The Shrewsbury, Oswestry, and Chester Junction Railway (Extension and Deviation) Act, 1846," and authorized them to raise, not exceeding 30,000*l.*, in 3000 shares of 10*l.* each. The 9 & 10 Vict. c. 251, authorized the consolidation of the Shrewsbury, Oswestry, and Chester Junction and the North Wales Mineral Railway Companies, by the name of "The Shrewsbury and Chester Railway Company." That the 10 & 11 Vict. c. 144, authorized the Shrewsbury and Chester Railway Company to make certain branches, and to provide station room and other conveniences in the city of Chester, and to raise additional capital for those purposes; and for amending the

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former acts relating to the said company, it declared that the act should be called "The Shrewsbury and Chester Railway Act, 1847," and empowered the company to raise additional capital, not exceeding 175,000*l.*, to be apportioned into shares of such amount as the same could be conveniently divided at any general or special meeting of the company. That the Shrewsbury and Chester Railway Company completed their main line sometime in the year 1849, and that they had completed some, but not all their branches and works; and the railway company, previous to the month of February, 1849, had created and issued shares for the full amount of all the capital which they were authorized to raise by their several acts, and that they had, under their borrowing powers, borrowed, in addition to their capital, 325,160*l.* That the capital which the company had raised, and were authorized to raise, was not more than sufficient for the completion of their railways and works, and that the directors had no power to apply the capital or funds of the company to any purpose not authorized by their acts of Parliament.

The bill then stated that the 11 & 12 Will. 3, c. 24, and the 6 Geo. 2, c. 30, were passed to enable the mayor and citizens of Chester to recover 'and preserve the navigation of the River Dee; and by the 14 Geo. 2, c. 8, intituled "An Act for incorporating the undertakers of the navigation of the River Dee," the subscribers were incorporated by the name of "The Company of Proprietors of the undertaking for recovering and preserving the navigation of the River Dee," and that large powers were conferred upon them for that purpose, with powers to take duties, tonnage dues, and payments. That the 17 Geo. 2, c. 28, was passed to explain and amend the 6 Geo. 2, c. 30. By that act new duties and tonnage dues were imposed, and two supervisors were appointed and empowered to make soundings in the river, and if for three successive tides it should be found silted or choked up, so that there would not at a moderate spring tide be in the channel from the sea to Wilcox Point fifteen feet water, then if the company suffered it to continue for four months after an affidavit of the fact was made by the supervisors, the tonnage duties were suspended until the depth of fifteen feet should be regained; but if it should be allowed to continue for eight months, then certain commissioners named in the 6 Geo. 2, c. 30, were authorized to enter upon the lands of the company and receive the rents until the depth of fifteen feet in the channel should be regained. , That the company of proprietors of the undertaking was possessed of large estates and considerable capital, and had hitherto duly exercised the powers and performed the duties required of them. That one of the merchandise and mineral stations of the railway company was situate at Saltney, on the banks of the River Dee; and the directors of the railway company, in the beginning of 1849, conceived a design of improving the navigation of the River Dee, and with that view to procure, at the expense of the railway company, an act of Parliament to divest the company of undertakers of the powers vested in them, and to vest the conservancy of the River Dee and estuary in commissioners to be appointed by the railway company and others as conservators. That at a meeting of the

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railway company, held on the 23d of February, 1849, it was resolved by the directors and a majority of the shareholders present at such meeting, "that the directors should be authorized to take such steps and incur such necessary expenses as appeared to them calculated to promote the improvement of the River Dee, with a view to extending the traffic of the railway company." That the plaintiff and some of the shareholders present dissented, and voted against the resolution. That at another general meeting, held on the 28th of February, 1850, the report of the directors contained a paragraph stating that measures for improving the navigation of the River Dee had engaged the earnest attention of the directors, and that a bill had been brought into Parliament, which had been read a second time, the object of which was to compel the River Dee Company, who had landed estate yielding a rental of between 6000*l.* and 8000*l.* a year, which was liable to the expense of improving the navigation, to apply such part of their property as might be necessary for that purpose, and that the directors were prepared to support the bill in Parliament in accordance with the authority given to them at the general meeting, held the 23d of February, 1849.

The bill then stated that several amendments were made with a view to have the paragraph relating to the expenses of the bill then before Parliament expunged, but that they were negatived.

The bill also stated, that after the meeting, the plaintiff discovered that the bill before Parliament was intituled "A Bill for the conservancy and improvement of the River Dee," and that its object was to transfer the conservancy of the river and all powers then held and exercised by the corporation of Chester, and the company of undertakers for preserving the navigation, to twelve commissioners, to be called "The Dee Conservancy and Improvement Commissioners," six of whom were to be appointed by the corporation of Chester, two by the Company of Proprietors of the undertaking for recovering and preserving the navigation of the River Dee, two by the rate-payers of the parishes of Hawarden and Northop, and two by the directors of the Shrewsbury and Chester Railway Company; that the bill had been brought into Parliament by the directors of the railway company, but the expense had been borne by the railway company, with the exception of a sum of 200*l.* which had been contributed by other parties; that the bill was strongly opposed by the Company of Proprietors of the undertaking for recovering and preserving the navigation of the River Dee, and in consequence expenses to the amount of many thousand pounds would necessarily be incurred by the directors in promoting the bill in Parliament.

The bill also stated that, since the last general meeting, the directors of the railway company had actually advanced and paid or deposited in the hands of some person or persons whose names they refused to discover, the sum of 2000*l.*, part of the funds of the company, to be applied towards payment of the expenses of prosecuting the bill in Parliament, and that they intended to apply the same and also a further sum of money belonging to the company for the like purposes. The bill then charged that such acts were not within the powers of

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the company, and that it was illegal, and would be a breach of trust were the directors so to apply the funds of the company; and it prayed for a declaration that it was not within the powers of the Shrewsbury and Chester Railway Company, or of the directors thereof, and that it would be a breach of trust in the directors to apply any part of the funds of the company for any purpose not authorized by their acts of Parliament, or to prosecute or promote the bill in Parliament for the conservancy and improvement of the River Dee at the expense of the railway company, or to take any step or incur any expense in the name or on account of the railway company with a view to improve the navigation of the River Dee, and that the directors might be restrained from promoting or prosecuting the bill in Parliament for the conservancy and improvement of the River Dee at the expense of the railway company, or on the security of any of the moneys or funds thereof, and from applying or causing or permitting to be applied the said sum of 2000*l.* or any part thereof, or any of the moneys or funds of the railway company in or towards payment of any expenses already or thereafter to be incurred in or about the preparation, prosecution or promotion of the bill in Parliament, or in any wise relating thereto or for any other purpose not authorized by the acts of Parliament relating to the railway company, and from taking any steps or incurring any expense in the name or on account of the railway company with a view to improve the navigation of the River Dee.

A notice of motion, asking for an injunction, was given in the terms prayed by the bill; but upon its coming on, it appeared that the 2000*l.* mentioned in the bill had been actually expended; the motion then stood over upon the defendants' undertaking not to apply any further moneys towards the expenses incurred, the plaintiff at the same time undertaking to withdraw a notice which he had given to the bankers, into whose hands the 2000*l.* had been paid, without prejudice to any claim he might have in respect of the 2000*l.* against the defendants or any other person, and liberty was given to apply.

The motion was again brought on.

Mr. Turner, Mr. Roupell, and Mr. Speed in support of the motion. The capital of the company was contributed for the specific object of the undertaking, and cannot be applied for any purposes not contemplated by the railway acts. *Cohen v. Wilkinson*, 12 Beav. 125, 138; s. c. 18 Law J. Rep. (N. S.) Chanc. 378, 411. 1 Hall & Twells, 554. 1 Mac. & Gor. 481. *Colman v. The Eastern Counties Railway Company*, 10 Beav. 1; s. c. 16 Law J. Rep. (N. S.) Chanc. 73. *The Attorney General v. The Corporation of Norwich*, 16 Sim. 225. If the directors have any surplus funds, they must be applied in the manner directed by the acts of Parliament. There may be dividends payable to the shareholders; and if so, they may authorize the directors to apply them as they please, but the directors have no right to intercept the dividends of any shareholder, and, contrary to his wish, apply them in a way they may think for the benefit of the shareholder. So with the surplus, it is divisible according to their interest among the

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shareholders, and when each gets his share he may apply it as he pleases. In this case the directors are assuming to deal with the property of the shareholders without any power so to do, and they ought to be restrained from using the capital or pledging the credit of the company.

Mr. Malins and *Mr. Giffard*, for the defendants. The improvement of the navigation of the river will be a great advantage to the company. They have already brought the railway to the banks of the river, and, under powers conferred by the 12 & 13 Vict. c. 55, have erected wharves and warehouses, so that it will be the means of procuring for the railway company great increased employment. In this case the company are seeking to obtain powers to improve the navigation, which might be said to be a portion of the works incident to the undertaking, as it was made with reference to that outlet for the produce of the country, and the value of the railway would be greatly diminished if the water carriage was obstructed, and it appeared that the conservators of the river had not performed their duty. Suppose Waterloo Bridge was from any reason closed to the public, the terminus of the South-western Railway would be nearly valueless, and the directors of the company would be justified in employing the capital of the company in compelling the bridge committee to keep it open for the purposes of the public. In this case, therefore, the company were seeking to preserve the navigation for the benefit of themselves and the public, and were employing the capital of the company for purposes strictly legal and to prevent their own property being deteriorated by the defaults of others. If, in so doing, the directors had gone somewhat further, and had sought to render the advantages permanent, it was no more than seeking through this court to secure to themselves the use of that to which they were entitled, and no injunction ought to be granted to restrain them.

The MASTER OF THE ROLLS. This company was established for the construction of a railway. It became important that the railway should afford an outlet to the minerals produced from the lands near which it passed. It was to come up to the banks of the River Dee, upon which the company was authorized to erect wharves and warehouses. I find no fault with the statement, that the company was not only a railway company, but also a company for the erection of wharves and warehouses, in which they might have a very extensive business, and it could not fail to be known to every body connected with the railway that they were materially interested in the navigation of the River Dee; it might also be supposed that they knew the state of the navigation, and it must be concluded that the railway and the wharves and warehouses were constructed with reference to the known state of the river, and that it was supposed to be sufficient for the railway company to make the railway and the wharves and warehouses profitable, with reference to the then existing state of the navigation. If it had been thought necessary to improve the navi-

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gation of the River Dee for the purposes of this railway, there seems to have been no reason why powers to contribute towards that improvement should not have been contained in the 12 & 13 Vict. c. 55, as well as powers to construct the wharves and warehouses which must have had reference to the navigation. But it is perfectly clear that it was not contemplated by any of the acts of Parliament; they contain no words authorizing the employment of the capital in any way relating to the navigation, but, on the contrary, they seem to exclude any such intention. It is subsequently discovered by the company, that the navigation of the River Dee is not so good as formerly, and that it is deteriorating to such an extent that there has been a report made upon a government commission, that it will in time be choked unless effective means are taken to prevent it. This was information important to the railway company, whose prosperity depended, probably materially, on the navigation of the river being kept in a good state, and it was natural they should wish not only to prevent the deterioration of the navigation, but, if possible, to improve it, and had there been funds applicable, it would no doubt have been advantageous to the company to have employed them in improving the navigation of the river, and it might have been a most useful and profitable application of those funds; but as the acts of Parliament contain no powers which extend to this case, the company, who have funds applicable only to the particular purposes authorized by the act of Parliament, cannot apply them to any other purpose. I do not think that this question has ever been before the House of Lords; but so far as the power of the Court of Chancery extends, it has unalterably decided, that companies possessed of funds for objects which are distinctly defined by act of Parliament cannot be allowed to apply them to any other purpose whatever, however beneficial or advantageous it may appear, either to the company or to individual members of the company.

I cannot concur in the argument which has been used. It is said, that if you find yourself day by day, or for a series of days, getting worse, and that if some means are not taken to stop the mischief, the deterioration will increase to such an extent that all profit will be cut off, and that any interference to prevent the injury is like the resistance of an active encroachment from which you may defend yourself at law, and that as you are allowed to resist an encroachment at law, so you are entitled to take such measures as have been here adopted to prevent that deterioration which is going on in the river. There is no analogy between the two cases. If, taking the law as it stands, and without applying for any new law, an offence is committed or an encroachment is made, parties are bound by the principle of self-defence to take the proper steps to resist it; but taking the law as it stands, and wanting to make an alteration in the law for a purpose beneficial to yourself, is different from that which is represented. The law as it stands *ex concessis* in this case, does not allow the company to protect themselves from the deterioration, or at least to protect themselves in such a way as would be beneficial to them. But the argument addressed to me has been, that the

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expense would be so enormous that they could not do it under the powers of their present act; that they are not allowed by law to do it; and, because the law in its present state does not enable them with their present funds to do it; therefore, that they are to employ the funds of the company to enable them to take such steps as may be necessary to procure a new law authorizing them to do it. I concur in the decision of *The Attorney General v. The Corporation of Norwich*. You may resist an encroachment according to law, which the law does not allow, but you must not proceed to get a new law that you may profit your company. It is represented as no speculation in this case; but is it no speculation where the money employed in the hope of procuring the proposed act of Parliament may be wholly and entirely thrown away? I can understand that a profit may arise if the object is effected — a profit to the extent of the whole expense laid out; but suppose these parties had gone into Parliament with a bill that could not be carried through, and which, for any thing the court knows to the contrary, ought not to be carried through; and then suppose they had expended 2000*l.* or 3000*l.*, and that then it was found that it was brought in on too extensive a scale, and that all which was desired might have been got without an act of Parliament, or perhaps at one tenth part of the expense the act of Parliament had cost; is the court to consider that laying out 2000*l.* or 3000*l.* in a hazardous adventure of that sort is no speculation? I certainly cannot do so; and I am clearly of opinion that this is an application of the funds of the railway company which is not authorized by their acts of Parliament, and that they ought to be restrained from applying any further sum in the way they have done. As to the 2000*l.*, it was taken out of the jurisdiction of the court before the application was made, otherwise the injunction would have applied to the whole; as it is, it will be to prevent them from laying out any further sums of money for improving the navigation. I do not think I ought to give any costs, and I am of opinion that this must be considered as a continuation of the motion previously made.

*In re THE SHERWOOD LOAN COMPANY, ex parte SMITH.*¹

December 9, 1850, and January 11, 1851.

Company — Winding-up Acts — Loan Society — Persons entitled to present Petition — Societies within Scope of Acts — Grounds upon which the Court will interfere.

A petition was presented for the winding up of a loan society, in which certain persons united themselves together, to subscribe 8*s.* per month for each share for one hundred months, until the payments amounted to 40*l.* per share, and whenever there should be 200*l.* in hand, the members were to bid for the purpose of procuring a loan at 5*l.* per cent., the premiums to be divided among the members. After fifty-one meetings the society

¹ 20 Law J. Rep. (N. S.) Chanc. 177. 1 Sim. (N. S.) 165.

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ceased its operations, and the petition was presented on the ground that the funds had been mismanaged and the society had come to an end. The petition was resisted for three reasons: *First*, that the petitioner was not entitled to present the petition, as nothing was due to him from the society; *secondly*, that the society did not come within the meaning of the Winding-up Acts; and, *thirdly*, that this was not a case for the interference of the court:—

Held, that the petitioner being a member and claiming to be a contributory of the society was entitled to present the petition; that the object of the society being profit, it was within the meaning of the acts; and that, under the circumstances of the case, the court was bound to make the order for winding up, although it might be detrimental to the interests of the society.

THIS was the petition of James Smith, and it stated that in the month of September, 1843, the petitioner and other persons, being more than fifty in number, agreed to form a company or association, called the Sherwood Loan Company, for the purpose of raising the sum of 20,000*l.* or thereabouts, with the intention of afterwards lending and advancing the same to some of the other parties, at interest after the rate of 5*l.* per cent. *per annum*, under certain regulations then settled and agreed upon. That such rules and regulations were to the following effect: That the society should meet on the Tuesday in every fourth week, computing from the 12th of September, 1843; and special meetings might be convened at any time in certain specified cases. That the persons therein named should act as the committee of the club; and such committee should meet on the Friday after such monthly meetings, to conduct all such business of the company as should not be transacted at the general meetings. That the committee should fix the salaries of the officers of the committee, and also require the secretary to report whether any and what members were in arrear in their payments. That a treasurer should be appointed to receive all monthly and other payments contributed by the members, and dispose of and apply the same as should be ordered by the committee. That a secretary should be chosen by the committee, who should keep an account of the monthly subscriptions and other payments to be made to the company, and of all loans and allotments of money out of the funds or stock of the society to the several members thereof. That every member of the society, his executors or administrators, should pay to the treasurer, at every monthly meeting, 8*s.* upon every 40*l.* for which he should subscribe; and when he should have an allotment of money upon loan from the fund or stock of the company, he should also pay the additional subscription he should agree to give for the preference of having such loan by monthly instalments of 8*s.* upon every 40*l.* so advanced or allotted to him, until the whole of such additional subscription should be paid, together with interest for such loan or sum so advanced, after the rate of 5*l.* per cent. *per annum*. That every member who should neglect to pay his monthly subscription, additional subscription, interest, and other payments due from him to the society, should pay the same to the treasurer at the next monthly meeting, together with the sum of 10*l.* per month for every 20*s.* left unpaid. That when there should be in hand the sum of 200*l.* or upwards, the same should be disposed of on loan, under the direction

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of the committee, at such a price and in such a manner as in their discretion should be thought advisable, according to the nature of the security and amount of money advanced; but no member to have any more money on loan than he subscribed for. And in case of application for a loan for a greater amount than there should be cash in hand, the committee and trustees should have power to borrow such sum of money as they should think proper; and they might retain securities in their hands as a lien and security to them for all sums borrowed or guaranteed. That all monthly and additional subscriptions and interest and other payments should be paid to the treasurer, and should constitute the fund or stock of the society, which was to be for their mutual and proportionate benefit. That immediate payment should be made to the treasurer of all sums for which the members should be liable; and such sums should be recoverable by law as liquidated damages, or the treasurer, at his option, might retain and deduct the same from any money in his hands which should have been subscribed by the person from whom such payments were to be made. That every member of the society who should duly pay his subscriptions, his executors, administrators, or assigns, should, at all times during the continuance of the society, enjoy a distinct right, share, and interest in proportion to his monthly subscription, so that such interest should not be assignable and transferable, unless subject to the rules and regulations, during his lifetime, but at his decease to belong or go to his executors, administrators, or assigns; and, if requested by them, the society should take the share or shares, covering all payments and allowing interest from the time the sums had been paid. Other rules followed, respecting the persons eligible to become members of the committee; and the last rule was, that the company and these rules and regulations should remain and continue in full force and effect, and all the members of the society should be thereby bound, until all such members or their assigns, executors, or administrators respectively, should have borrowed and received the whole amount of money for which they should respectively have so subscribed, and until all arrears, fines, and forfeitures in and under any of the rules should be paid.

The petition then stated, that Kirke Swann was duly appointed the treasurer of the said company; and Thomas Sargent, since deceased, and afterwards Thomas Gascoigne, also since deceased, were appointed secretaries of the company. That the said Kirke Swann, Thomas North, Samuel Parsons, Thomas Sargent, and Thomas Gascoigne were constant attendants at the committee meetings of the company, and that they obtained a preponderating influence over the affairs of the said company, and they obtained possession of all the books, documents, and securities, and the control of the funds of the company. That monthly meetings of the company were held on the days appointed by the rules for more than fifty months, and the petitioner and most of the other members paid to the treasurer the money payable on the shares held by them. That the petitioner was possessed of five shares in the company, and had paid in respect thereof the sum of 102*l.*, and, with the exception of 50*l.*, which had been

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advanced to him under the rules, no sum had been allotted to him or paid out of the funds of the company; and divers other members of the company, who had duly paid the sums due from them, had received no advances or allotments out of the funds, or any return for the sums so paid by them. That the said Thomas North, Kirke Swann, Samuel Parsons, Thomas Sargent, and Thomas Gascoigne had, respectively, received sums of money on behalf of the company, amounting to nearly 2000*l.*, which they, or one of them, still retained, and had not accounted for, nor had the receipt of any of the said sums of money by them been entered in the books of the company. That the funds of the company had been misapplied and misappropriated, to a very great extent, and entirely through the contrivances of the said Thomas North, Kirke Swann, Samuel Parsons, Thomas Sargent, and Thomas Gascoigne. That large sums of money had been borrowed by the company, part of which was still owing. That large sums of money had been advanced by some of the committee to other similar loan companies, and also to persons not members of the company, without the concurrence of the committee and in contravention of the rules of the company; and there was still due and owing to the company, in respect of such moneys so lent and advanced, a large sum of money. That the sum of 4000*l.*, or thereabouts, was due from divers members of the company, in respect of their shares. That the sum of 2600*l.* had been advanced by the committee to one John Boot, one of the members of the company, on certain securities, which the said T. North had lately agreed to deliver up on the payment of 400*l.*, although there was a much larger sum due thereon, amounting, as the petitioner believed, to 1700*l.* and upwards. That the last meeting of the company was held in November, 1848; and the petitioner and certain other members of the company were unable to obtain a satisfactory account of the state of the funds, or to obtain payment of the sums of money due to them in respect of their shares. That the business of the company had altogether ceased, and the funds thereof ought now, after payment of the liabilities, to be distributed among the members, according to their several and respective rights and interests.

The petition prayed that the company might be absolutely dissolved and wound up, under the provisions of the Winding-up Acts, and that a reference might be made to the master for that purpose.

An affidavit had been filed by Mr. North, in which he alleged that the club could not be worked out under one hundred nights or months, and the company could not therefore be wound up at the present time. That the petitioner had paid to the fifty-first night, 102*l.*; and calculating from the fifty-first meeting night, with fines thereon, and interest on the sum of 50*l.* purchased out of the club by him, and according to the club rules, so far from the petitioner having any interest in the said club, he still remained indebted to the club, and the money due from him would entirely absorb the whole of his interest in the club. That it was not true that there had been no meeting of the club since the month of November, 1848, for that there was a meeting on the 26th of November, 1849, when it was resolved that the said

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J. Boot should be applied to for payment of the money advanced to him. That an action was subsequently commenced against him to compel payment of the sum amounting to 1083*l.*, and that the debt was afterwards compromised by a payment of 400*l.*, the committee believing that as the said J. Boot was at that time in embarrassed circumstances, it was the most prudent course to be adopted. That another meeting of the committee took place on the 18th of March, 1850. This deponent further stated, that he could deny or explain the whole of the allegations in the petition, but he submitted that the petitioner was not entitled to come before the court, inasmuch as he had no interest whatever in the club, the whole of his interest having been absorbed in consequence of his non-payment, according to the rules of the club, and that, consequently, he was not now a member of the club, and that there was no reason why this company should be wound up under the acts. Then followed a number of affidavits, made by the members of the club; some of them alleging, in support of the petition, that the affairs of the club had been mismanaged, and ought to be wound up under the acts, and others alleging that the business had been carried on with propriety, and in a manner the most beneficial for the interests of the club. It also appeared that the said T. North had offered and agreed, for the purpose of avoiding litigation, and saving the unnecessary expenditure of money, to satisfy the claims of certain members of the company, whose claims, including the money borrowed by the company, and interest due thereon, amounted to the sum of 1265*l.*, and amongst which claims the claim of the petitioner for 42*l.* was included, by instalments of 100*l.* per month, for the first three months, and 50*l.* per month until the whole should be paid; and also to pay the bill of costs, which the solicitor told him would amount to the sum of 55*l.* It turned out afterwards, however, that the solicitor's charges, for law expenses, up to and including the order for dismissing the petition, amounted to 85*l.*, when Mr. North, thinking the charges exorbitant, refused to pay the increased demand, and the petition was brought on for hearing.

Mr. Rolt and *Mr. Craig* appeared for the petition.

Mr. Bethell and *Mr. Glasse*, contra, contended that this society did not come within the meaning of the Winding-up Acts. The second act did not alter the tests required in the first act, and under none of these could this company be ranged. The petition did not allege that the company had committed an act of bankruptcy, (clause 1,) 11 & 12 Vict. c. 45, s. 5; nor was it unable to meet its engagements, (clause 2,) nor was it subject to judgments recovered, (clause 3,) nor subject to decree or order made, (clause 4,) nor had an action been brought against any member for the company's debts, (clause 5,) nor was the company sued by a creditor whose debt would support a *fiat*, (clause 6,) nor had the company been dissolved, (clause 7.) The 8th clause, then, was the one under which the petitioner must have supposed he could come to the court, but was there any matter or thing shown

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which, in the opinion of the court, rendered it just and equitable that the company should be dissolved? The opinion of the judges was against extending the operation of these acts. There was no test here of the insolvency of the company, and Vice Chancellor Knight Bruce, in the case of *Ex parte Spackman*, 1 De Gex & Sm. 599; s. c. 18 Law J. Rep. (n. s.) Chanc. 261, 1 Hall & Twells, 229, held, that upon a petition presented under the Winding-up Act for a dissolution, the court could only interfere upon proof of the existence of some of the tests of insolvency prescribed by the act, and was not entitled to go into the pecuniary accounts of the company; and that the permitting a number of members to retire upon terms did not amount to a dissolution of the company. The real test was, whether this company was a trading company. Now, it was clear that they did not carry on business for profit; and the company had no existence beyond its own members. In the case of *The Herne Bay Pier Company, ex parte Burge*, 1 De Gex & Sm. 588; s. c. 18 Law J. Rep. (n. s.) Chanc. 71, though the undertaking was carried on for a profit, the same principle was laid down. This case was still stronger. The company could not obtain credit, or incur debt, or give credit. In several cases before the Vice Chancellor Knight Bruce, he had expressed his opinion that these acts had done more harm than good, and there could not be a stronger instance of that fact than the case now before the court. This was a friendly society, and by the 2d section benefit building societies (enrolled) were excluded. At any rate, this petitioner was not entitled to have the company wound up, as he had, in fact, no interest in the company, his interest having been extinguished by the amount of fines incurred by him.

Mr. Craig, in reply, contended that the petitioner was a contributory within the meaning of the acts, and consequently was entitled to petition. In the cases cited it was held, that the companies were not commercial, and on that ground the order was refused. Not all building societies were excluded, but only such as were enrolled. In this case there could be no question as to the petitioner's right to present the petition.

Judgment reserved.

January 11, 1851. LORD CRANWORTH, V. C. This was a petition under the Winding-up Act for an order for the winding up of this company. The society was a society established at Nottingham of a somewhat peculiar nature—peculiar as it strikes me, for I have not been accustomed to see societies of this sort—in which a great number of persons united themselves together, to subscribe a sum of so many shillings a month as should amount eventually to 200*l*. The shares were divided, I think, into shares of 40*l*. each, and in respect of each share the subscribers were to pay 8*s*. on the first Tuesday of every lunar month, every four weeks, so it was thirteen times 8*s*. in the course of the year. They were to make these payments until the sum they so subscribed amounted to 40*l*. The present petitioner was a subscriber for five of these shares; and the way the

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money was to be applied was this, that from time to time when they had money in hand, 200*l.*, I think, the members were (as I understand the regulations, for they are a little obscure) to bid to see who would give the most, in order to have the advantage of having a loan to him. So that there would be a profit coming to the society from the sum of money bid, as it were, for getting the loan, and also from the interest paid, which was 5*l.* per cent. That would be the profit they would take. Those who got no loan at all, for the last person would never have any loan, would get his advantage by having had the chance of obtaining a loan, and by having divided between him and the others the premiums that had been paid for the loans and the interest—he would have his share. That was the nature of the society. Now, it appears that it went on all very regularly up to about the year 1848, at which time it seems the meetings ceased—I do not mean absolutely ceased, for there were one or two, but it did not go on regularly, certainly the petitioner never subscribed any thing after that day. It would seem from the affidavits that nobody, or, at any rate, very few, only one or two, subscribed, and that only for a week or two afterwards. In this state of things, application was made by this petitioner, as it is stated and admitted, to the gentlemen chiefly acting in the management of the concern, asking to have the money returned, and the concern wound up; but those applications not having been successful, this petition is presented. The application is resisted on three grounds: first, it is said that the petitioner is not a party entitled to present a petition; secondly, that the society is not a society within the meaning of the Winding-up Acts; and, thirdly, that if it is, no case has been made out to render it incumbent on the court to make an order, or if not incumbent on the court, there is nothing to induce the court to exercise a discretion in favor of so winding up the concern.

With regard to the petitioner not being a party, that depends on this: It was said, that from the state of the accounts it could be shown that he, having had the benefit of a loan of 50*l.*, was greatly in arrear to the society, which more than exhausted his whole interest. I do not think that signifies, because the petition is to be presented according to the provisions of the Winding-up Act by any person being or claiming to be a contributory; and by the definition, any member of the concern is described to be a contributory. Now, this petition is presented by a person claiming to be a member, therefore that objection, I think, is unfounded; and I do not think that stands in the way of the petition.

Secondly, it is said that this is not a corporation or society within the meaning of the act of Parliament. I think it very doubtful whether it would have been within the meaning of the first act of Parliament; but whether within it or not, is not for me to speculate on. Undoubtedly, the words of the second act are quite large enough to take in almost every association of persons formed for an object of profit if there be more than the requisite number of members, seven, and, no doubt, there is more than that number here. The language of the act is, "every association of persons formed for some common

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object,"—but I will take it to be for an object of profit. It is true that profit might not, in its ordinary sense, have been the primary object of these parties,—I doubt whether profit was to be the sole object in the act,—I give no opinion about that; but I take it to be clear that profit was one of the objects which these parties had in view, and if it was, it may come within the meaning of the act.

Then, it is said, that if the petitioner was a person entitled to petition, and the case was within the meaning of the act, still it was a case in which the court would not direct a reference; that it was one which must come to an end in a few years, and that the court would not direct the winding up. I confess, although very reluctantly, for a reason I will presently state, I think that this is within the act. The act of Parliament expressly points out one of the grounds on which a petition for winding up is to be maintained, as being when the business of the company has come to an end. I think for all practical purposes that the business of this association has come to an end, and I collect that from the affidavit of the gentlemen themselves who are sought to be charged as having received a great part of the funds. Mr. North in his affidavit, after stating a negotiation between him and the petitioner, in which he had made certain proposals, says, "that to prevent any necessity for litigation, or any unfriendly feeling, I have offered to pay each of them, that is, each of the parties complaining, by instalments, the whole of the money paid by each of them unto the said company, but which they have refused to receive without also being paid interest. That I refused to pay such interest, because I say that the offer was made by me in consequence of the insolvency of several members of the company, and unavoidable losses thereon, more than they were legally or equitably entitled to, or could by any legal or equitable means obtain. That I made this offer from a desire to have the affairs of the company wound up fairly and beneficially for all parties; and that I am not in any wise personally liable or answerable for the losses the company have sustained, and ought not to be charged therewith." I do not at all mean to say that he is. It seems to me extremely doubtful whether he can be charged at all; but still the whole course of his conduct towards the parties shows that he, like the rest of the parties concerned in this matter, was perfectly persuaded the affairs of the company must be wound up. There are similar expressions in other parts of the affidavit. "That to prevent litigation, I have offered to pay all the members having equitable or legal claims on the said company, all the money they have paid unto the said company, without interest, which I consider a most liberal and beneficial offer, as they cannot possibly be entitled to more than that amount on a fair and equitable distribution of the remaining funds of the company." Therefore, I think, the case is one in which the petitioner is clearly a party entitled to petition: the society is a society to which both, or at least one, of the acts applies, and that the circumstances are such as make it the duty of the court to direct the winding up. I must say I extremely regret it for a reason I will mention.

[*Mr. Bethell.* If your lordship will pardon me, we pressed you

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lordship to consider whether you would not make the preliminary order; that is, a reference to see whether it would be expedient to wind up the association.]

LORD CRANWORTH, V. C. I fully considered that, and I shall be glad always to do it, because one gets rid of an uncomfortable responsibility, but my difficulty about it is this: the real objection I have to referring it is to be deduced from what I am now going to refer to. It appears that these parties were negotiating about this matter, and Mr. North actually offered to pay, without interest, (that was the dispute,) and to give the gentleman, the solicitor for the petitioner, 50*l.* for his costs of only preparing this preliminary matter; to which he answers, every thing else being settled, "I cannot do that, for my costs up to this moment are 85*l.*" Now, it does stagger one to think that in matters of this sort 85*l.* should be the amount of costs incurred before the matter is attempted to be set going. I am reluctant to make the order, and should be glad to be able to say, I must leave the parties to settle this as they can; but I have not a right to do that, for I have not a right to make myself wiser than the law. I was exceedingly anxious to push the matter off, if I may say so, by referring it to the master, but I should only be telling him to tell me that which I know as well as he can, for I know every thing he can know. Therefore, I think, the cheapest as well as the best way is to make the usual order for the winding up.

[*Mr. Bethell* said that this order, like nineteen out of twenty, would be an order for the profit of the solicitors and the injury of every body else.]

LORD CRANWORTH, V. C. I see Vice Chancellor Knight Bruce made an observation in a case before him, that if this act of Parliament is as beneficial to the rest of her majesty's subjects as it is to the profession of the law, it is a great achievement in legislation. I will just mention this point, that it must not be taken that I mean to hold out the notion that because the party has claimed this 85*l.*, he is entitled to it. It may be reduced on taxation.

[*Mr. Bethell* suggested that if the court should direct a preliminary reference, and the master should upon that find it was not for the benefit of the parties, the order might then be refused. From what had fallen from the court it might be inferred that the conviction of his lordship was, that it would not be for the benefit of the parties. Therefore, if that were put in the way of being brought judicially forward, the court would be in a position to refuse the order.]

LORD CRANWORTH, V. C. I think it is for the benefit of the parties. I assume that the act of Parliament is a beneficial act for her majesty's subjects, and it may be that it will be really for the benefit of the parties to put up with their losses. I do not know that that is the meaning of the act, and I do not know that the matter could be settled in a cheaper or more expeditious way for the parties. Sometimes we know that the shell is all the parties get, and the oyster goes

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somewhere else; but I think that I cannot look at that. It appears to me that I am bound to make an order for the winding up of the company.

DELARUE v. CHURCH.¹

January 28, 1851.

Annuities — Presumption — Act of Parliament — Parish Rates.

An act of Parliament was passed in 1816, for the purpose of raising 5000*l.* for the repair of one of the parish churches in London. The act appointed certain persons to be trustees, and gave them the power of levying rates, and authorized them to raise the money required by the granting of life annuities, by way of simple annuity, or for the lives of two persons or the survivor, with this restriction, that no annuity should be granted for any single life at a higher rate than 8*l.* 3*s.* per cent. when the life of the annuitant should be under thirty-five. In 1817, in consideration of 2500*l.* paid by A, the trustees granted an annuity of 225*l.* to A and B and the survivor. B was then thirty-three years of age. Another act was passed in 1819, which recited that the trustees had raised 5000*l.* and granted annuities to the extent of 297*l.*, (which included the above-mentioned sum of 2500*l.*, and the annuity of 225*l.*,) and enacted that the annuities already granted should be paid in the first place out of the rates. The annuity was paid up to 1848, when the trustees resisted further payment, on the ground that the grant had been void under the act of 1816:—

Held, that, if the grant had been void under the act of 1816, the defect was cured by the act of 1819.

The restriction contained in the act of 1816 was directory, and not prohibitory, *semble*.

Almost every thing will be presumed in favor of a grant fairly made, and under good advice on the part of the grantors, and acted upon for upwards of thirty years.

THE Church of St. George the Martyr, in Bloomsbury, was one of the fifty churches built under the act of Parliament passed in the reign of Queen Anne, and there was no power at common law to raise money by rates for the repair of the edifice.

The church being very much out of repair, and requiring a considerable sum for its restoration, an act of Parliament was passed in 1816, (56 Geo. 3, c. 28,) for the purpose of raising the necessary funds.

By that act certain trustees were appointed, with a provision for a perpetual succession, and a power was given to the trustees of levying rates; and it was declared that the clerk for the time being of the trustees should sue and be sued in the name of the trustees.

By the 17th section of the act it was enacted, that it should be lawful for the trustees, and they were thereby authorized and required to raise, by the granting and sale of life annuities to any person or persons, either by way of *simple annuity*, or by way of *tontine upon any two or more lives*, or the life of the survivor of them, or by way of loan upon bonds as therein mentioned, any sum or sums of money not exceeding in the whole the sum of 5000*l.*

The 18th section is in part as follows: "And for preventing improvident grants under this act, be it further enacted, that no annuities

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shall be granted by virtue of this act for *any single life* at any higher rate than the following, (that is to say,) where the age of the annuitant or person for whose life the annuity shall be granted shall not exceed thirty-five years, the annuity to be granted shall not exceed the rate of 8*l.* 3*s.* for every 100*l.* of the consideration money paid for the purchase thereof; when the age of such person shall not exceed forty years, the annuity to be granted shall not exceed the rate of 8*l.* 10*s.* for each 100*l.* of such consideration money; when the age of such person shall not exceed forty-five years, the annuity shall not exceed the rate of 9*l.* for each 100*l.* of the consideration money."

By the 21st section it was declared that all the annuities or annuity so to be purchased and secured under or by virtue of the act should be charged upon, and made payable, from time to time, out of the moneys arising by or from the rates and assessments by the act directed to be made.

By a deed-poll, dated the 13th of May, 1817, in consideration of 2500*l.* paid by J. M. Delarue, the trustees granted to J. M. Delarue and Susanne his wife an annuity of 225*l.*, payable half yearly to J. M. Delarue and Susanne his wife, and the survivor of them, his or her assigns.

At this time Mrs. Delarue was thirty-three, and Mr. Delarue was fifty-six years old. The annuity was granted at the rate of 9*l.* per cent.

It will be observed that the 18th section of the act limited the annuity to be given for a single life under thirty-five to 8*l.* 3*s.* per cent.; so that, had the annuity been granted to Mrs. Delarue alone, the grant would have exceeded the prescribed limit; and also that, although the 17th section authorized the raising money by annuities upon any two or more lives, there is no limit stated in the 18th section for such a case.

Further sums being required for the parish, another act was passed in 1819, 59 Geo. 3, c. 11, for that purpose.

The 1st section contained the following statements:—

"And whereas the said trustees appointed by the said act have proceeded to carry the purposes thereof into execution, and have raised the sum of 5000*l.* on the credit of the said rates in the manner by the said act directed, and have caused the said parish church to be well and substantially repaired, altered and improved,—

"And whereas a rate of 6*d.* in the pound upon the said parish, as authorized by the said act, will produce the annual sum or income of 800*l.* and upwards, and the annuities charged thereon under the said act, amount together to the annual sum of 297*l.* and no more."

It was admitted that the 2500*l.* paid by Mr. Delarue formed a part of the sum of 5000*l.*, and that the annuity of 225*l.* granted to them formed a part of the annual sum of 297*l.* mentioned in the statements contained in the act.

By the 9th section of this act, it was enacted that all the moneys to be from time to time produced by the rates should by the trustees be, from time to time, disposed and applied in paying the annuities already granted while subsisting, and the other sums therein mentioned.

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The annuity was regularly paid from the time of its being granted until the year 1848, when the trustees of the parish, having considered that the grant had not been authorized by the act 56 Geo. 3, c. 28, declined to make any further payment.

The bill which was filed by Mrs. Delarue, who had survived her husband, against the clerk of the trustees, prayed for a declaration of her right to receive the annuity, and that the trustees might raise the amount by rates, and pay the same accordingly.

The bill did not pray for a receiver.

Mr. Wigram and *Mr. Craig*, for the plaintiff, contended, first, that the act of 56 Geo. 3, c. 28, not having provided any limit for any annuity to be granted on two or more lives, the annuity in question did not come within the restrictions of the 18th section. Secondly, that the 18th section was merely directory, and not prohibitory. *Kerrison v. Cole*, 8 East, 237. Thirdly, that if the annuity had been prohibited by the 18th section, the defect had been cured by the 59 Geo. 3, c. 11. Fourthly, that if the annuity had been prohibited and the defect had not been cured, it was not entirely void, but merely void for the excess; *Griffiths v. Vere*, 9 Ves. 127; and that, if so treated, the past payments were not to be taken into account. Fifthly, that the length of time barred the trustees from resisting the claim. *Nicholls v. Leeson*, 3 Atk. 573.

Mr. Roundell Palmer and *Mr. Archibald Smith*, for the defendant, contended that the court had no jurisdiction in the matter; *Drewry v. Barnes*, 3 Russ. 94; s. c. 5 Law J. Rep. Chanc. 47; and that the 18th section of the act of 56 Geo. 3, c. 28, was prohibitory; and that the grant was, therefore, void; and cited *Knapp v. Williams*, 4 Ves. 430, *n. Mellish v. Brooks*, 3 Beav. 22; s. c. 9 Law J. Rep. (N. S.) Chanc. 362. *The Queen v. St. Margaret, Leicester*, 8 Ad. & E. 889. *The King v. The Inhabitants of Gravesend*, 3 B. & Ad. 240; s. c. 1 Law J. Rep. (N. S.) M. C. 20. *The King v. The Justices of Leicester*, 7 B. & C. 6; s. c. 5 Law J. Rep. M. C. 95.

Knight Bruce, V. C. The case of *Drewry v. Barnes* was a special and a particular case, and, in my opinion, does not govern the present, in which I think that the court has jurisdiction. To what extent it is to be exercised is another question.

Whether the annuity is within the prohibitory clause—if it is a prohibitory clause—which constitutes the 18th section of the act of 1816, I give no opinion; but, for the present purpose, I will assume that point in the defendant's favor.

The next question is, whether the 18th section is directory merely, or has the effect of avoiding every grant or contract which infringes its provisions. My impression is, that it is directory only, and does not avoid any grant or contract which infringes its provisions. This point, however, in my opinion, it is not necessary to decide, but I think it right not to let it pass without expressing my opinion upon it.

Delarue v. Church.

However this may be, this annuity was granted fairly; was granted under very good advice on the part of those who granted it; was granted by persons representing a wealthy and respectable body; and was granted so far back as May, 1817. From the month of May, 1817, the annuity was regularly paid up to the year 1848, a period of more than thirty years, without opposition or observation, during which time those who have received it have regulated their habits and mode of life upon the faith of this provision. Now, considering that there are thirty years during which this property has been peaceably enjoyed, it is consistent with the whole course of authority, and with all the analogies of our law, to presume almost any thing capable of supporting such a grant. I am not quite sure that there has not been sufficient length of time to presume an act of Parliament. It is sufficient to go the length to which the courts go in some instances, and to which they went in Lord Mansfield's time. It is sufficient to say, that almost any thing ought to be presumed, after such a length of enjoyment, capable of supporting the grant.

I do not, however, rest there; for, this grant having been made fairly, honestly, openly, and under good advice, an act of Parliament was passed in 1819, nearly two years after the grant, a public act, as the former was, and obtained, I must take it as probable, by the very grantors of the annuity. In this act it is stated — [His honor then read the two recitals contained in the statement of the case.] It has been stated, and either proved or admitted, that the annual sum of 297*l.* included the annuity now in question, and that, without it, the proposition would be untrue. On the footing of this preamble the enactment proceeds. After authorizing more money to be raised, the 9th section provides — [His honor then read the 9th section, which appears in the statement of the case.]

It is in the face of these facts that this defence has been made. In my opinion it fails in law and in equity, and this lady is entitled to the benefit of this suit, and to all the costs which the court can give.

To what extent the relief is to go is another question, a question rather of form than of substance, for, if the decree to be made in this suit shall not give her at once all that she is entitled to, she will be justified in instituting another suit, and so from time to time as shall be necessary. At present it appears that there are funds in the hands of these trustees applicable to the payment of the arrears. Let a sufficient sum be so applied, and declare that Mrs. Delarue is entitled to have the annuity kept down from time to time in the manner prescribed by the act of Parliament, and let there be liberty to apply. I do not appoint a receiver, as it is not necessary, and let the defendants pay all the costs of the suit.

Crafton v. Frith.

CRAFTON v. FRITH.¹

February 14, 1851.

Will — Construction — Mortmain Act — Discretion of Trustees — Education.

A testator bequeathed the residue of his estate to trustees, to be purchased into the funds, for the following purpose, viz., for opening new schools, subscribing to those already opened in England, Scotland, Ireland, and elsewhere, and purchasing land to be let out to the poor at a low rent, such rent to be applied to any benevolent purposes his trustees might think proper:—

Held, that the residue was divisible into two equal parts, and that one of such parts was applicable to the purposes of education, according to a scheme to be settled by the court, and that the trusts of the other part were void under the Mortmain Act.

PHILIP FRITH, by his will, which was executed on the 13th of August, 1842, after several devises and bequests to different persons therein named, made the following disposition:—

“The remainder and residue of my property I give and bequeath to my friends, R. Sterry, R. Barrett, and J. Barrett, in trust to be purchased into the funds for the purposes hereinafter mentioned; viz., for opening new schools, subscribing to those already opened in England, Ireland, Scotland, or elsewhere, and in purchasing land to let out to the poor at a low rent, and the rent to be applied to any benevolent purpose the said R. Sterry, R. Barrett, and J. Barrett may think proper.”

The testator died in March, 1844.

This was a suit for the administration of the estate of the testator. The only question in the cause was as to the effect of the clause above stated; it being insisted, on the part of the next of kin, that it was void for uncertainty.

The arguments used sufficiently appear in the judgment.

Mr. Wigram and *Mr. Sidney Bell*, for the plaintiffs.

Mr. Swanston, *Mr. C. P. Cooper*, *Mr. Bacon*, *Mr. W. P. Wood*, *Mr. J. Parker*, *Mr. Malins*, *Mr. R. Palmer*, *Mr. Metcalfe*, *Mr. Rogers*, *Mr. Messiter*, *Mr. W. M. James*, *Mr. Nichols*, and *Mr. Waley* appeared for the other parties.

The following cases were cited: *Foy v. Foy*, 1 Cox, 163. *Blandford v. Fackerell*, 4 Bro. C. C. 394. *Chapman v. Brown*, 6 Ves. 404. *The Attorney General v. Parsons*, 8 Ibid. 186. *Morice v. The Bishop of Durham*, 9 Ibid. 400; s. c. 10 Ves. 532. *James v. Allen*, 3 Mer. 17. *Henshaw v. Atkinson*, 3 Madd. 306. *The Attorney General v. Hinxman*, 2 J. & W. 270. *Pritchard v. Arbouin*, 3 Russ. 458; s. c. 5 Law J. Rep. Chanc. 175. *The Attorney General v. Mill*, 3 Russ. 328; s. c. 5 Law J. Rep. Chanc. 153. *Williams v. Kershaw*, 5 Law J. Rep. (N. S.) Chanc. 84; s. c. 5 C. & F. 111. *Mather v. Scott*, 2 Keen, 172; s. c. 6 Law J. Rep. (N. S.) Chanc. 300.

¹ 20 Law J. Rep. (N. S.) Chanc. 196.

Crafton v. Frith.

KNIGHT BRUCE, V. C. The first question is, whether the testator has given any discretion to the trustees as to the proportions in which they are to apply the residue for the several objects mentioned in the will, or a discretion to the extent of excluding any one of those objects. The testator has specified several objects. I do not think that any intention or wish can be attributed to him of putting it in the power of any one to exercise a discretion, so as to effect the exclusion of any of the purposes which have been mentioned. But there is something more than silence; because, when the testator intended discretion to be exercised, he has said so; for he provides that the small rents, which the poor are to pay, are to be applied to any benevolent purposes which the trustees may think proper. I am of opinion that, construing the will as it would have been construed if the Mortmain Act had not passed, discretion was excluded in the sense which I have mentioned, and that the trustees, therefore, would have been under the obligation of dividing the fund into two or three shares, and applying them in the manner directed.

The question has been very properly and very fairly argued whether the division is to be into two or into three shares. Upon the whole, my opinion is, that the two first purposes, although apparently two, are in reality but one. The whole is a single purpose, namely, charitable education, although the testator has used the expressions "for opening new schools, or subscribing to those already opened in England, Ireland, Scotland, or elsewhere." I think, therefore, that the division which the trustees would have been bound to make, (supposing the case to be without the Mortmain Act,) is a division into two; and that they would not have had a discretion to the extent of taking half from the purposes of education. I am of opinion that the first purpose has not been made unlawful by the Mortmain Act. I think that it is clear (whatever be the meaning of the word "benevolent") that the second purpose has been made illegal by the Mortmain Act — the purpose being to purchase land, to be let out to the poor at a low rent.

The result of my judgment is, that half of the residue belongs to the next of kin, and that the other half must be applied to the purposes of education. There must be a reference to the master to settle a scheme; or I will, if the parties wish it, settle the scheme myself.

Hobby v. Allen.

HOBBY v. ALLEN.¹

March 26, 1851.

Baron and Feme — Reversionary Interests.

A married woman can do no act to affect her reversionary interest in a sum of money charged upon land, during the lifetime of the tenant for life.

By indentures of lease and release, dated the 2d and 3d of March, 1827, two estates, called the Byford and Bishopstone estates, were conveyed unto, and to the use of, Thomas Eckley and William Hobby, and their heirs, upon trust that they should pay the rents of the Byford estate to Jane Hobby for life, and, after her decease, should raise thereout the sum of 250*l.*, and pay the same to Mary Ann Hobby on her attaining twenty-one years, and should raise the other sums therein mentioned; and should be seized thereof, subject as aforesaid, upon trust for R. Hobby and T. B. Hobby, their heirs and assigns; and upon the further trust that they should pay the rents of the Bishopstone estate to Jane Hobby for her life, and, after her decease, should raise thereout the sum of 150*l.*, and pay the same to Mary Ann Hobby on her attaining twenty-one years, and should raise the other sums therein mentioned, and, subject as aforesaid, should be seized thereof, upon trust for T. B. Hobby, his heirs and assigns. In the indenture of release were contained a power for the trustees, with the consent of Jane Hobby, to sell both estates, a power to give receipts to purchasers, and a direction that the trustees should invest the net purchase moneys in the purchase of other lands, to be conveyed to them, on the same trusts as the lands which they had been so empowered to sell.

Both the estates were sold by the trustees under the power, and the net purchase money, being 1,250*l.*, was received by them.

Mary Ann Hobby attained the age of twenty-one years in 1843, and in 1845, married Mr. Hughes.

Under an order made in this cause, the sum of 500*l.*, part of the net purchase money, was paid into court, and invested in the 3*l.* per cent. consols, and such stock, with the accumulations, amounted to 738*l.*, 3*l.* per cent. consols.

By an indenture dated in 1851, to which Jane Hobby the tenant for life, Mr. and Mrs. Hughes, and all the persons interested in the estates were parties, the sum of 738*l.*, 3*l.* per cent. consols, then in court to the credit of the cause, was assigned to trustees, freed from the direction to lay it out on land, upon trust to dispose of it in the manner therein mentioned. Mr. and Mrs. Hughes executed this deed, and Mrs. Hughes acknowledged it in the manner required by the Fines and Recoveries Act.

By the 1st section of that act, 3 & 4 Will. 4, c. 74, it is enacted "that the expression 'money subject to be invested in the purchase

¹ 20 Law J. Rep. (N. S.) Chanc. 199.

Hobby v. Allen.

of lands' shall include money, whether raised or to be raised, and whether the amount thereof be, or be not, ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands."

By the 77th section of that act it is enacted, "that it shall be lawful for every married woman to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right may have in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a *feme sole*."

By the 8 & 9 Vict. c. 106, s. 6, it is enacted that "a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, may be disposed of by deed," and that every such disposition by a married woman shall be made conformably to the provisions of the Fines and Recoveries Act.

This was a petition presented by Jane Hobby, Mr. and Mrs. Hughes, and the other persons parties to the deed of trust of 1851, praying for a transfer of the sum of 738*l*, 3*l*. per cent. consols, to the trustees of that deed.

Mr. Winstanley, for the petition, contended that, before the Fines and Recoveries Act was passed, a married woman could, by fine, effectually dispose of such an interest as Mrs. Hughes had in the stock. *Goodrick v. Shotbolt*, Prec. Ch. 333. *May v. Roper*, 4 Sim. 360. *Forbes v. Adams*, 9 Sim. 462; s. c. 8 Law J. Rep. (N. S.) Chanc. 116. He then referred to the Fines and Recoveries Act.

[*Knight Bruce*, V. C., said that it might be assumed, that whatever power a married woman had before that act, she had after that act. If, however, it was considered that her powers were enlarged by that act, it would be pertinent to cite it.]

Mr. Winstanley then referred to the 1st and 77th sections of the 3 & 4 Will. 4, c. 74, and the 8 & 9 Vict. c. 106, s. 6, mentioned in the statement of the case. Mrs. Hughes then might, before the Fines and Recoveries Act, have passed this interest by a fine, and can now effectually dispose of it since that act, by a deed executed in pursuance of it.

Knight Bruce, V. C. The object of this petition is the reversionary interest of a married woman in a sum of money charged on land. I think that the married woman can do no act to affect such an interest during the life of the tenant for life. This does not come new upon me; it is a point upon which my mind has long been made up.

Methold v. Turner.

METHOLD v. TURNER.¹

February 27, 1851.

Will — Construction — Lunatic — Contribution.

A, the father of C, by his will, gave the income of his residuary estate (after the death of B, the mother of C) to trustees, upon trust, to apply it as they should think proper for the benefit of C; and died in 1815. B, by her will, gave the income of her residuary estate to trustees, upon trust to apply a sufficient part of the income for the maintenance of C during his life, and declared that, in case there should be a surplus of income, such surplus should be considered as principal, and invested accordingly, and gave such principal on the trusts therein mentioned, and died in 1832. C was found a lunatic in 1818. The annual sums allowed for the maintenance of C were less than the annual income of both the estates of A and B:—

Held, that the income of B's estate was to be first applied for the maintenance of C, in exoneration of the income of A's estate.

BAILEY BIRD, by his will, dated the 9th of May, 1814, bequeathed all his residuary real and personal estate to trustees, upon trust, during the joint lives of his wife Ann Bird and his son Bailey Bird, to pay the income in the manner therein mentioned, and to raise certain sums of money in an event which did not happen; and, "after the death of his said wife Ann Bird, to pay such income, subject as aforesaid, unto his son Bailey Bird, or to lay out and expend the same in such manner as the said trustees, or the survivor of them, should think proper in the maintenance and support, and for the benefit of the said Bailey Bird and his child or children during his life."

The will also contained the following clause: "And I hereby earnestly entreat the said trustees acting in the execution of my will, and particularly from and after my wife's death or marriage, to take special care that my said son shall be always creditably and decently dressed, and that he shall be provided with a sufficiency of clean linen, and with a reasonable quantity of pocket money in silver, and to attend to his wants and comforts; and I request them to employ a proper person or persons to superintend my estates, and to take care that the same are kept in good repair, order, and condition."

The testator died in October, 1815.

Mrs. Bird, the widow, by her will, dated the 22d of April, 1831, bequeathed her residuary personal estate to trustees, on the following trusts: "Upon trust, in the first place, to apply a sufficient part of the dividends, interest, and income in the maintenance and support of my son Bailey Bird during the term of his natural life, taking especial care to provide him with every comfort suitable to his situation in life, and with sufficient pocket money; and, in the next place, to set apart a further portion of the said dividends, interest, and income sufficient for, and to apply the same in, keeping and maintaining a horse and gig for the use and benefit of my said son Bailey Bird, and in remunerating and paying a proper person or proper persons to attend to the keeping and care of the said horse and gig, and for all

¹ 20 Law J. Rep. (N. S.) Chanc. 201.

Methold v. Turner.

other purposes appertaining thereto; and, in case there shall be any surplus of the said dividends, interest, and income remaining in their or his hands, unapplied to any of the purposes aforesaid, then I direct that such surplus shall be considered as principal money, and invested accordingly."

The testatrix then bequeathed such principal money as last before-mentioned and the capital of her residuary personal estate and upon the trusts therein mentioned.

The testatrix died in August, 1832.

Bailey Bird, the son, who had always been of weak intellect, was found a lunatic in 1818.

By different orders made in the lunacy, certain annual sums had been directed to be paid for the maintenance of the lunatic. These annual sums had been less than the annual income arising from both his father's and his mother's estates, but greater than the annual income arising from the mother's estate.

The two sets of trustees had been always aware of the question of the contribution of the income of the two estates to the maintenance of the lunatic; but, by arrangement, all the income of the father's estate had been applied for such maintenance, and the surplus income of the mother's estate had been invested and accumulated, without prejudice to the question of the ownership of the fund so arising.

The bill, which was filed by Bailey Bird and his committee, prayed for a declaration that the accumulated fund arising from the mother's estate belonged to the lunatic, and that the income of the mother's estate might for the future be applied in the first instance for his maintenance, in exoneration of the income arising from his father's estate.

Bailey Bird died in 1846, and the suit was revived by his administrator.

The cause now came on to be heard.

Mr. Roundell Palmer and *Mr. Miller*, for the plaintiff. The rule is, that, where there are two funds applicable to the maintenance of an infant or a lunatic, and the income of the two funds is more than is required for such maintenance, the proportions in which these funds are to bear the burden of the maintenance is to be determined solely by reference to the interest of the infant or lunatic. *Foljambe v. Willoughby*, 2 Sim. & S. 165. *In re Ashley*, 1 Russ. & M. 371. *Bruin v. Knott*, 1 Phil. 572; s. c. 14 Law J. Rep. (N. S.) Chanc. 440. Here the income of the mother's estate was liable to such maintenance. If this had been all applied, there would have been some surplus income of the father's estate, which would have belonged to the lunatic. If the income of the father's estate had all been applied, there would have been some surplus income of the mother's estate, which would have belonged to other persons. It would have been, therefore, for the benefit of the lunatic that the mother's estate should have been so applied in the first instance. It follows from this that the fund arising from the mother's estate will belong to the plaintiff.

Smith v. Leathart.

The Attorney General, Mr. Metcalfe, and Mr. Fooks for the persons entitled to the mother's estate, contended, that Mrs. Bird must be taken to have known the provisions of her husband's will; and that the proper construction of her will was this — if the income of the father's estate should prove insufficient, then that her income should be applied to make good the deficiency, but that it should only be so applied; that the whole income, or the surplus income, as the case might be, of her estate should in that case go over to the persons designated by her. They cited *Rawlins v. Goldfrap*, 5 Ves. 440.

KNIGHT BRUCE, V. C., said that, although the testatrix must have been aware of the provisions contained in her husband's will, he did not consider that her mind had been at all addressed to them when she made her will. She must be taken to have made her will without reference to the income to which the lunatic was entitled from other sources. He must consider that, according to the true construction of the will of the testatrix, she devoted the whole of the income of her estate for the benefit of her son for his life, with this restriction only, that, if this income was more than sufficient for his maintenance, the surplus should be added to the principal. He thought that the question as to the contribution of the father's and mother's estates must be decided solely with reference to the interest of the tenant for life, and that the fund in question belonged to the plaintiff.

By the decree it was declared that the plaintiff was entitled to the clear income of the residuary personal estate of the testatrix during the life of the lunatic, and to the accumulation and increase made from such income.

SMITH v. LEATHART.¹

January 15, 1851.

Practice — Numerous Parties.

Bill by four of the next of kin of an intestate, for the administration of his estate, on behalf of themselves and all others the next of kin. The bill alleged that the next of kin were very numerous, but no evidence of that fact was adduced. Upon an affidavit, under the 13 & 14 Vict. c. 35, that the next of kin were upwards of twenty in number, the court made the usual administration decree.

THIS was a bill filed by four persons, on behalf of themselves and all other the next of kin of an intestate, against his administrators for the administration of his estate. The bill stated that the next of kin of the intestate were very numerous, being, in fact, about fifty in number. There was, however, no evidence in support of that allegation. The cause now came on to be heard.

¹ 20 Law J. Rep. (N. S.) Chanc. 202.

Stanton v. Holmes.

Mr. James Parker and *Mr. Josiah Smith*, for the plaintiffs, asked for the usual decree.

Mr. W. P. Wood, *Mr. Pownall*, and *Mr. Berkeley* for the other parties.

Knight Bruce, V. C., said, that he thought that, before making the decree, there ought to be some evidence of the number of the next of kin. This evidence might be supplied by an affidavit, under the 13 & 14 Vict. c. 35. Upon the production of an affidavit to the registrar that the next of kin were more than twenty in number, the decree might be made.

STANTON v. HOLMES.¹

February 21, 1851.

Pleading — Scandal — Answer — Exceptions.

The answer of a defendant contained these passages: "The plaintiff is desirous of annoying and harassing the defendant to extort money from him." "The plaintiff is acting under the advice of ignorant but cunning persons, who are in expectation of extorting money from the defendant, in order to be relieved from being harassed by the vexatious and illegal conduct of the plaintiff." The plaintiff took exceptions to these passages for scandal. The exceptions were overruled.

THE bill in this suit was filed for the purpose of recovering some real and personal estate in the possession of the defendant, to which the plaintiff alleged that he was entitled.

The answer of the defendant contained two passages, which were the subject of the exceptions after mentioned. The first passage was as follows: "The said complainant is desirous of annoying and harassing this defendant, to extort money from this defendant." The second passage was as follows: "This defendant believes that the plaintiff is acting under the advice of ignorant but cunning persons, who are in expectation of extorting money from this defendant, in order to be relieved from being worried and harassed, and put to expense by the illegal and vexatious conduct of the said complainant."

The plaintiff excepted to the above passages for scandal. The exceptions now came on to be heard.

Mr. C. P. Cooper and *Mr. Bilton*, for the exceptions, contended that the imputation of such motives as those contained in the above-mentioned passages amounted to scandal, and that the plaintiff had a right to require that such passages should be removed, and that the record should be purified.

[*Knight Bruce*, V. C., said, that he supposed that every thing

Stanton v. Holmes.

that was scandalous was impertinent, but that, of course, it did not follow that every thing that was impertinent was scandalous; and asked whether there was any definition of scandal in any book of practice, or in any case.]

Mr. C. P. Cooper said that he was not aware of any such definition.

Mr. Russell, amicus Curiae, said that he had been in a case before one of the masters where the plaintiff had excepted to these words in an answer for scandal, "as in the said bill falsely and scandalously alleged," and that the master had allowed the exception.

Mr. Swanston and *Mr. Schomberg*, for the defendant, were not called upon.

KNIGHT BRUCE, V. C. The wonder that any one should have thought it worth while to insert such charges in an answer, is only equalled by the wonder that any one should have thought it worth while to take exceptions to them for scandal. However, here they are, and they must be dealt with. The first exception is to this passage: "That the plaintiff was desirous, by annoying and harassing the defendant, to extort money from him." Now, I suppose that, if the defendant were to prove that the plaintiff had said, "I am desirous of annoying and harassing the defendant to extort money," such evidence might be allowed to have some materiality in the question of costs. But if this charge had not been contained in the answer, a proof of it would not have been admissible. Although, then, it is as nearly immaterial as any thing can be which is not wholly immaterial, I do not think that it is entirely immaterial. The same observation applies to the other charge. The defendant may, under this allegation, prove that the plaintiff had said, "I am acting under the advice of ignorant but cunning persons, who are in expectation of extorting money from the defendant, in order to be relieved from being put to expense by my conduct, which I admit is illegal and vexatious." Although this is all but nonsense on both sides, my impression is, that the exceptions ought not to be allowed. One is almost ashamed of giving any thing that has the semblance of reasoning on this subject. As to costs, I say nothing.

Mr. Swanston and *Mr. Schomberg* contended that the exceptions ought to be overruled with costs; but

KNIGHT BRUCE, V. C., refused to give costs.

Jackson v. Craig.

JACKSON v. CRAIG¹.

February 22, and March 8, 1851.

Costs in Special Cases — 13 & 14 Vict. c. 35 — Will — Construction — Devise void for Uncertainty.

At the hearing of special cases, under the 13 & 14 Vict. c. 35, the court has power to give directions as to costs.

The will of a testator contained the clauses following: "Let my debts be paid. Let all my goods and chattels be sold, and the fund accumulated, except so far as is needed for the comfortable settlement of the family, except 200*l.* a year to be laid by as a marriage portion for my daughter A. A. C. My son E. C. C. is heir to the whole real estate:"—

Held, that the above directions were void for uncertainty, and that the testator was to be taken to have died intestate, both as to his real and personal estate.

THE REV. E. CRAIG made his will in the following language: "In the name of my blessed Savior I appoint this my last will and testament. I appoint J. H. Jackson, Esq., of Islington Green, and John Barstow, Esq., barrister of the Fig-tree Court, Temple, my executors; and the Rev. Horatio Dudding, clerk, of St. John's, St. Albans, and my dear wife, joint guardians of my children. I hope he will educate my boy. I have a house in Edinburgh, a farm at Revel End, Redbourn, Herts, a piece of land at Burton Latimer, a leasehold interest in my house at Barnsbury, and railway bonds in the hands of Smith, Payne, & Co. Let my dear wife's settlement be regularly paid. Let my few debts be justly paid. Let all my goods and chattels be sold, and the fund accumulated, except so far as is needed for the comfortable settlement of the family somewhere, excepting 200*l.* a year to be laid by as a marriage portion for my dear daughter Adelaide Amelia Craig. Edward Cunningham Craig is heir to the whole real estate."

The testator died soon after the date of his will, which was proved by Mr. Jackson. The testator left his wife and the two children named in the will him surviving. He did not leave any other children.

The testator, at the time of his will, was absolutely entitled to a house at Edinburgh, and to some real estate situated at Burton Latimer, which together produced 150*l.* a year, and to personal estate of the value of about 7000*l.*

The testator was married in 1838. On this occasion, by one settlement, an estate called Revel End, belonging to him, producing about 260*l.* a year, had been settled on the usual trusts; and, by another settlement, a sum of stock, belonging to Mrs. Craig, had also been settled on the usual trusts. The annual income arising from the settled property was about 380*l.*

This was a special case, under the 13 & 14 Vict. c. 35, in which Mr. Jackson was plaintiff, and Mrs. Craig and her children defendants. The case, after stating the above circumstances, desired the decision of the court as to the construction of the will.

¹ 20 Law J. Rep. (N. S.) Chanc. 204.

Jackson v. Craig.

The points discussed were, whether from the mention in the will of the farm at Revel End, which was included in the settlement, there was any case of election raised; and what was the effect of the directions as to the 200*l.* a year for the daughter.

Mr. Archibald Smith, for the plaintiff.

The Attorney General and *Mr. Shapter*, *Mr. James Parker* and *Mr. Wood*, *Mr. Wigram* and *Mr. Hanson*, for the other parties.

KNIGHT BRUCE, V. C. The first question is, whether, on the settlements, or either of them, a case of election is raised against the widow, or either of the children. I think that the language used is too vague and obscure to render such an interpretation safe or allowable.

I think, indeed, that the will does not dispose of any beneficial interest in any part of the testator's property, with the single exception, if it is one, of the 200*l.* a year, mentioned with respect to his daughter.

I think, however, that, on the whole, this cannot be considered as an exception. I think that the testator ought not to be considered to have meant, by what he says on the subject, any thing more than a direction how his daughter's property, whatever it might happen to be, or a part of it, should be applied; a direction which, whether intelligible or not, is certainly ineffectual. It follows, in my opinion, that the testator's real estate has descended, and that his personal estate must be applied as if he had died intestate.

The Attorney General then asked that the costs of all parties might be paid out of the testator's estate.

KNIGHT BRUCE, V. C., said that he doubted whether he had jurisdiction under the act to make any direction as to costs.

The Attorney General then read a part of the 32d clause of the 13 & 14 Vict. c. 35, which is to this effect: "That, until any general rules or orders shall be made, the proceedings under this act shall be governed and regulated by the provisions herein contained, so far as the same extend, and, in so far as the same do not extend, shall be governed and regulated by the rules, orders, and practice of the court in suits instituted by bill, so far as the same can be applied thereto; and, subject to such general rules and orders as aforesaid, the costs of all proceedings under this act shall be in the discretion of the said court.

KNIGHT BRUCE, V. C., said that he thought that the section of the act to which his attention had been called gave him power to direct the payment of costs; which power, in this case, he would exercise accordingly.

 Smith v. Stewart.

SMITH v. STEWART.¹

February 22, and March 18, 1851.

Will — Construction — Dying without leaving Issue.

A testator, by his will, gave certain shares of his residuary personal estate to certain legatees.

He then directed that "the whole of the legatees should have the benefit of survivorship between them, in the event of any one or more of them dying without leaving issue:"—

Held, that "the dying without leaving issue" did not refer to death in the lifetime of the testator.

THE will of Thomas Smith, late of Gibraltar, shipwright, dated the 18th of August, 1849, after a direction that his debts and his funeral and testamentary expenses should be paid, and the gift of a specific legacy therein mentioned, proceeded as follows:—

"I give my gold watch to my brother James; in case of his death before me, to my sister Agnes; and, in case also of the death of my sister Agnes before me, then to the eldest son of my sister Agnes; and, as to all the rest, residue, and remainder of my property, both real and personal, and of every nature and kind, whatsoever and wheresoever, I direct the same to be divided into fourteen equal parts or shares; and I give, devise, and bequeath the said fourteen shares in manner following; that is to say, to my brother James Smith, now or late of Penceraig by Ross in Herefordshire, his heirs and assigns, three shares; to my sister Agnes, the wife of John Affleck, now or late of Brunswick Street, Edinburgh, her heirs and assigns, one share; to the four children of my said sister Agnes, their heirs and assigns, one share each; to the four children of my deceased sister Euphemia, formerly the wife of George Knight, late of Little France, near Edinburgh, deceased, their heirs and assigns, one share each; and to the two children of my deceased sister Grace, formerly the wife of ———— Lies, late of ————, deceased, their heirs and assigns, one share each; and I direct that the whole of the said legatees shall have the benefit of the survivorship between them in the event of any one or more of them dying without leaving issue."

The testator died in September, 1849, leaving all the legatees named in his will him surviving.

This was a special case, under the 13 & 14 Vict. c. 35, which, after stating the will, death, and probate, and that the executors had in their hands a considerable sum of money, part of the residuary personal estate, desired the opinion of the court whether, according to the proper construction of the will, the legatees were entitled to absolute interests, or whether their shares were liable to any and what right of survivorship.

Mr. Bacon, Mr. Selwyn, and Mr. Cairns for the different parties.

The following cases were cited: *Shergold v. Boone*, 13 Ves. 370.

¹ 20 Law J. Rep. (N. S.) Chanc. 205.

Smith v. Stewart.

Farthing v. Allen, 2 Madd. 310. *Home v. Pillans*, 2 Myl. & K. 24; s. c. 4 Law J. Rep. (N. S.) Chanc. 2.

KNIGHT BRUCE, V. C. The question in this special case is as to the meaning of the words "dying without leaving issue," contained in the will before the court. Three constructions may be suggested, namely, first, that they mean "dying in my lifetime without leaving issue;" secondly, that they mean "dying after my decease without leaving issue," and thirdly, that they mean "whether in my lifetime or after my decease without leaving issue." It is only necessary to decide whether the first construction is right or wrong, for, as I understand, all the legatees mentioned in the will are alive. That construction appears to me not according to the proper force, ordinary sense, or presumptive meaning of the words; and, therefore, ought not to be adopted, unless a departure from the proper force, ordinary sense, or presumptive meaning should be required by the context, or by circumstances, if any, admissible in evidence. Extrinsic circumstances are here out of the case, so that the only point is upon the context.

The directions as to the watch seem to me, if not immaterial, rather to bear against than for the first construction. The language of contingency which the testator has made use of is not inaccurate, as the proposition, that a man will die without leaving issue, differs from the proposition that a man will die. It may also be remarked, that, if James Smith had died in the testator's lifetime, the shares given to him must have lapsed, whether he left issue surviving, or not surviving, the testator, or left no issue; for there is no gift, by way of substitution or otherwise, to any issue of James Smith. This name I of course select merely by way of giving one instance.

On the whole, I am of opinion that the context does not warrant a departure from the proper force, ordinary sense, or presumptive meaning of the words under consideration, and that the first construction cannot be adopted, and that one of the other two is right.

This is a conclusion which I think is not forbidden by *Cambridge v. Rous*, 8 Ves. 12, nor by any authority previous or subsequent to *Billings v. Sandom*, 1 Bro. C. C. 393, which happens to be another Gibraltar case.

The same question as in the last case, as to costs, was then raised.

His honor made the same order as to costs.

In re St. George Steam Packet Company, ex parte Hamer.

*In re ST. GEORGE STEAM PACKET COMPANY, ex parte HAMER.*¹

April 1, 1851.

Company — Winding-up Acts — Contributory — Liability of Devisee of a Shareholder.

A. the holder of shares in a joint-stock company, by his will, devised his real estate to B, and made C his executrix. A died in 1838. At this time the company was solvent, and all their debts and liabilities, then existing, were afterwards discharged, in the regular way, out of their assets. C, after A's death, was treated as the proprietor of the shares, and for five years received dividends on them. C's name was put on the list of contributories, under the Joint-stock Companies Winding-up Acts, as the personal representative of the testator; but it appearing that the testator's personal estate had been exhausted, B's name was also placed on the list as the legatee of the testator. No action could have been brought against B, and no liability could have been established at law in respect of the shares : —

Held, that B was not liable, under the Joint-stock Companies Winding-up Acts, as a contributory.

THE deed of settlement of the St. George Steam Packet Company was dated the 20th of December, 1833. By that deed it was declared that the company should continue for ninety-nine years, and that the proprietors should be entitled to the profits, and liable to the losses, in proportion to their shares.

James Hamer was a holder of twenty-five shares in the company.

James Hamer, by his will, gave and devised all his real estate to his wife for her life. The will then proceeded as follows: "And after her death I give and devise the same unto my daughter Everalda Sarah, now the wife of Joshua Rawdon, Esq., her heirs and assigns forever. Nevertheless, I do conditionally wish and desire that my said daughter, her heirs and assigns, shall, after the decease of my said wife, in case of her surviving me, pay one half of the clear annual profits thereof into the hands of my son James Hamer during his life, monthly, or half yearly, as she or he shall think proper." The testator appointed his wife and daughter his executrices.

The testator died in October, 1838, and his will was proved by his executrices.

At the time of the testator's death the company was solvent. For five years after the death of the testator, Mrs. Hamer received the dividends, which were from time to time declared on the shares, and was treated as the proprietor of them.

The company was ordered to be wound up, and Mrs. Hamer's name was put upon the list of contributories, as personally liable in respect of the shares, and not in her representative character. Her name was afterwards removed from the list, and the names of Mrs. Hamer and Mr. and Mrs. Rawdon were put on it as the personal representatives of Mr. Hamer.

Mrs. Hamer died in April, 1850. In August, 1850, an affidavit was filed by Mr. and Mrs. Rawdon, to the effect that the personal

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estate of Mr. Hamer, the testator, had been duly administered and exhausted.

The master charged with the winding up of the company then placed the names of Mr. and Mrs. Rawdon, and Mr. James Hamer, the son, on the list of contributories, as the devisees of the testator.

This was a motion by way of appeal from the master's decision, for the removal of the names of Mr. and Mrs. Rawdon and Mr. James Hamer from the list, in the character of devisees.

When the case was before the master, the following admissions were entered into by the official manager: "That there is not now due and owing any debt of the said company which was due at the death of the testator, James Hamer, and that all the liabilities, in respect whereof contribution is now sought, were incurred by the company after the decease of the said testator, and that the company was duly dissolved under the provisions of their deed of settlement on the 14th of September, 1843."

Mr. Malins and Mr. H. Humphreys, for the motion. No new liability is created by the Winding-up Act. If, then, it can be established that Mr. and Mrs. Rawdon and Mr. Hamer would not have been liable to contribute to the losses of the company, before that act was passed, it is clear that they are not now liable. The statute of Fraudulent Devises, 3 W. & M. c. 14, first made devisees liable to the testator's specialty debts. It has been established, that, in order to enforce a debt against devised estates under this act, the relation of debtor and creditor must have existed at the time of the death of the testator. *Wilson v. Knubley*, 7 East, 128. *Farley v. Briant*, 3 Ad. & E. 839; s. c. 4 Law J. Rep. (N. S.) K. B. 246. The statutes 1 Will. 4, c. 47, and 3 & 4 Will. 4, c. 104, have made the lands of deceased debtors assets for the payment of their "debts." By debts, however, must be meant, as laid down in the above-cited cases, debts which were due from the testator at the time of his death. Now, it is admitted here, that all the debts due from the company at the time of the testator's death have been paid out of the company's assets. The company was solvent at that time. There was then no relation of debtor and creditor existing at the testator's death between him and the company. The case then stands thus: there are no rights against a testator's devised estates but what had been conferred by the statute law, and the statute law here gives no rights to any person to come upon the testator's devised estates in respect of the debts of the company. It may also here be remarked, that a testator's real estate cannot properly be administered by a court of equity until the accounts of the personal have been taken, and it has been ascertained that such estate is deficient. Here no such process has been gone through. It would be most inequitable that the devisees here should be held to be liable. The testator died in 1838. The company was then, as before stated, solvent. The devisees had no control, and no power, over the shares. The executrix took them, and, for some years, received dividends on them. Yet, after an undisturbed possession of the real estate under the will for upwards of twelve years,

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the devisees are called upon to contribute to the losses of the company incurred in respect of engagements entered into long after the testator's death. The court will not, unless obliged by the clearest enactments, impose this hardship on them.

Mr. Bacon and *Mr. J. V. Prior*, for the official manager. The language of the statutes for the payment of debts is not to be construed so strictly as contended for on the part of the appellants. The word "debts" in the two later statutes ought properly to take in, not only all the liabilities which the testator was under at the time of his death, but all those to which his estate might afterwards become subject. In *Morse v. Tucker*, 5 Hare, 79; s. c. 15 Law J. Rep. (N. S.) Chanc. 162, a testator had by his will charged his real estate with the payment of his debts, and it was held that damages for a covenant broken after the death of a testator were a debt within the meaning of the word "debt" as used in the will.

[*Knight Bruce*, V. C. Why should the word "debts" mean one thing in the statute 3 & 4 Will. 4, c. 104, and another thing in a will?]

It is submitted that the same construction should be given to the word "debt," both in the statute and a will. So in *Willson v. Leonard*, 3 Beav. 373, a testator charged his real estate with the payment of his debts, and the master of the rolls held that the real estate was subject to make good, not only the debts which were absolute debts at the time of the death of the testator, but also the contingent debts; and in *Birmingham v. Burke*, 2 Jo. & Lat. 699, where a testator had charged his real estate with the payment of his debts, Sir E. Sugden held that it was charged with all the debts which would affect his personal estate.

Knight Bruce, V. C. I think it right first to assume that neither the debts nor the liabilities which subsisted at the time of the testator's death now exist; and also that they have been discharged, not by payments made by any person in the character of surety, (for, if that had been so, they might be considered as, in a sense, still alive,) but in the regular and ordinary way, out of the funds which were regularly, properly, and primarily applicable to their payment.

Secondly, I assume that the liability in question could not have been established in an action. The whole question arises upon the statute law—the statutes being the 1 Will. 4, c. 47, the 3 & 4 Will. 4, c. 104, and the Joint-stock Companies Winding-up Acts. I give no opinion how the case would have stood if the liability in question could have been established in a court of law, or could have been properly made the subject of an action. The question is one of what I have often heretofore had occasion to call "internal liability;" that is, a liability of contribution *inter se*. It is not a question whether the devisees are, or are not, liable to any proceedings by a creditor of the company, as such creditor. The testator died so long ago as 1838. Since this time the executrix has been admitted as the holder or proprietor of the shares in question, probably in her representative character, but still as proprietor. Besides this, five

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years afterwards the company is treated as solvent; that is, as having assets more than sufficient for the payment of the debts, for profits were received by the executrix from time to time for five years after the testator's death. It is, after this length of time and after this course of proceeding, that the members of the company, who thus deal with the executrix, come forward and say that the devisees (who had no control over the shares, and had not received any benefit whatever arising from them) are liable. I am of opinion that it is not for a court of equity, at their instance, to establish a liability. It is only upon equitable considerations, properly belonging to such a case, that a bill can be filed; and, if it were, it would probably be dismissed. I am of opinion that the devisees cannot be placed, in their character of devisees, in the list as contributories. All parties must have their costs out of the estate. I doubt very much whether the ground on which I have put my judgment was submitted to the master.

HUSKISSON v. BRIDGE.¹

February 28, 1851.

Will — Construction — Precatory Words.

A testator, by his will, gave all his real and personal estate to his wife, to enjoy the same "in the fullest manner, subject to the following provisions." The testator then gave certain legacies. He then desired that all his property should continue at interest, in the same situation as at the time of his death, for the benefit of his wife, and that his wife should make a will and divide the property between his and her relations, in such manner as she should think they deserved. He then declared that, if his wife should be rendered unable to make a will in the manner before suggested, this property should be sold, and that the money should be divided in the manner therein mentioned. The testator then declared that the last clause was "not to do away with, or prevent his wife from exercising, the entire right over his property, should she be enabled to carry it into effect in the way he had left it to her, or in any other most agreeable to herself." The widow of the testator, by her will, gave some legacies to her relations, but did not dispose of the residue of her estate:—

Held, that the testator's property had, under his will, vested absolutely in the widow, and went to her next of kin.

MR. SWAN made his will, dated the 14th of February, 1831, which commenced as follows:—

"I, William Swan, of, &c., do hereby, of my own free will and consent, give and bequeath unto Mary Swan, my dearly beloved wife, the whole of my property and effects of every description, both real and personal, together with all my cash, whether at my bankers (the Bank of England) or otherwise, with my book debts which may appear by my last ledger to be owing, bills becoming due, &c., with all the household furniture and effects whatsoever, to use and enjoy the whole, and the interest arising from the same, in the fullest and most unconstrained manner, subject, nevertheless, to the following

¹ 20 Law J. Rep. (N. S.) Chanc. 209.

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provisions, donations, stipulations, &c., that is to say." (The testator then gave certain legacies to the persons therein named, who were nearly related to him and his wife.)

"It is likewise my will and desire that a full and particular schedule be taken of all my property, (of which I have left amongst my papers a memorandum,) and that such of my property as is placed in the funds, or at interest, as well as shares in any concern, shall remain and continue in the same situation as at the time of my decease, at interest, for the sole use, benefit, and advantage of the aforesaid Mary Swan, my very sincere friend and faithful wife; and it is moreover my particular will and desire that she, the said Mary Swan, knowing the great uncertainty of human existence, do, as soon as can conveniently be done, make her own will and testament; and it is also my will and desire that the said will be made in such a manner that my whole property, which at my dear wife's decease may be then remaining, shall be so divided between the relations hereinbefore mentioned as shall be pretty nearly equal in amount between my own relations and those of my dear wife, and in such portions to each individual as she may think they deserve, or, by their respectful or kind behavior to herself, they appear to have merited at her hands.

"It is also my will and desire that my dear wife should be at liberty, during her lifetime, to afford assistance to the relations of either side, as she may think they deserve, or as she can afford, without doing injury to her own circumstances, or abridging her own comforts. The numerous small bequests in this will will be found to amount to between 1200*l.* and 1300*l.*, which will not distress the circumstances of my dear wife, and which I hope she will approve; they will serve, at least, to prove to the parties that they were not forgotten; but I have thought it right to bequeath the principal part of my property to my dear wife, to repay her, as far as it is in my power, for the extraordinary pains she has taken by her prudent economy in assisting to acquire it. I thus leave it at her own disposal, almost without restraint, that she may have it more in her power to remunerate those the best who may have been found the most deserving of her favors.

"It is also my will, and I hereby constitute and appoint the aforesaid Mary Swan, my dearly beloved wife, to be the whole and sole executrix of this my last and only will and testament, being of opinion that she will do strict justice to all the parties interested in the just division of my property. I however beg to recommend to the consideration of my dear wife, in the event of her surviving me, and making a will, the propriety of securing by her will a portion of what she may dispose of to female relations, if not the whole, in such a manner as it may be for their own use and benefit, so as to protect them against improper conduct on the part of any husband of such as are married, or of them that may hereafter become so. And, lastly, with a view of guarding against a possible case happening to my dear wife in her present ill state of health, arising from any disease, or by increased infirmities of any kind, so as to be rendered unable to make a will, in the manner by me previously suggested, (in

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regard to the mode of disposing of my property,) as well as to prevent the consequences which would arise from her dying intestate, I further will and direct that in such case, and that case only, the whole of my freehold, leasehold, and personal property, of every description, shall be sold to the best advantage, as soon as conveniently may be after the decease of my dearly beloved wife, and, after paying all debts and demands which may be then due from either of us, as also the charges and expenses of funerals, proving this my will, and attendant thereon, the clear residue or surplus to arise therefrom to go to and amongst the before-named several relations, both on my side as well as on Mrs. Swan's, to whom I have by this my will given specific legacies in manner following." (The will then proceeded to make certain dispositions among the legatees mentioned in the former part of the will.) "And in such said case of intestacy occurring, I do appoint, but not otherwise, my said brother, Simon Swan, and my friend Mr. John Abbott, executors to carry my wishes into effect. But it is my express will and determination, that the precautionary clause or power, lastly provided for, is not to do away with, or in any the least to deprive my said wife from exercising the entire right and will over my said property, should she be enabled to carry it into effect in the way I have before left it to her, or in any other most agreeable to herself."

The testator died in February, 1831.

Mary Swan made her will, dated in May, 1837, and thereby gave several legacies to her own and the testator's relations, but made no disposition of her residuary estate.

Mary Swan died in 1846.

The bill in this case was filed by the executors of Mrs. Swan against the next of kin of Mr. and Mrs. Swan. The only question in the cause was, whether the testator's property had become absolutely vested in Mrs. Swan, so as to pass, subject to the legacies, to her next of kin.

The legatees named in the testator's will were parties to the suit in the character of the next of kin of the husband and the wife.

Mr. Swanston and *Mr. Piggott*, for the plaintiffs, cited *The Attorney General v. Hall*, Fitzg. 314. *Flanders v. Clark*, 1 Vez. Sen. 9. *Knight v. Knight*, 3 Beav. 148; s. c. 9 Law J. Rep. (N. S.) Chanc. 354.

Mr. Russell, *Mr. Wigram*, *Mr. Teed*, *Mr. Roundell Palmer*, *Mr. Hetherington*, *Mr. Sidebottom*, and *Mr. W. H. Smith* for the defendants.

The following other cases were cited: *Malin v. Keighley*, 2 Ves. Jun. 335. *Outhbert v. Purrier*, Jac. 415. *Bardswell v. Bardswell*, 9 Sim. 319; s. c. 7 Law J. Rep. (N. S.) Chanc. 268. *White v. Briggs*, 15 Sim. 17; s. c. 17 Law J. Rep. (N. S.) Chanc. 196. *Johnston v. Rowlands*, 2 De Gex & Sm. 356; s. c. 17 Law J. Rep. (N. S.) Chanc. 438.

KNIGHT BRUCE, V. C. I should have thought, but for the concluding paragraph of this will, that this case was one of very great diffi-

Dickin v. Ward.— Ward v. Dickin.

cally, and I should not have been able to say when, or how, I should have decided it. That paragraph ending with the words "most agreeable to herself" removes all difficulty. It plainly shows that the desires and wishes which he had before expressed were what, in the language of the law, we term precatory. She took the whole absolutely, subject to the payment of the legacies previously given.

DICKIN v. WARD. — WARD v. DICKIN.¹

March 14 and 15, 1851.

Accounts — Evidence.

A gave a bond to B for 4000*l.*, and died, leaving C his executor. B died, leaving D his executor. Bill by D, against C, to enforce the bond. C filed a cross bill against D, alleging that there had been various accounts between A and B, and that the bond ought to be taken subject to the account, and not according to the letter; and, in support of such allegations, adduced, as evidence, an account in the handwriting of B. A decree was made in the causes for taking the accounts between A and B, and for an inquiry as to the circumstances under which the bond was given:—

Held, on exceptions to the master's report, that the account in B's handwriting was to be taken as evidence in favor of B and against A, as well as in favor of A and against B.

GEORGE DICKIN and Stephen Dickin, who were brothers, had a variety of dealings and accounts together. George Dickin died, leaving Mr. Ward and Mr. John Dickin his executors; and Stephen Dickin died intestate, and administration was taken out to him by his widow, Mary Dickin.

After the deaths of the brothers, a bond, which had been given by George Dickin to Stephen Dickin for 4000*l.*, was set up by Stephen Dickin's administratrix against George Dickin's executors. This formed the subject of the suit of *Dickin v. Ward*.

Another bill was filed by George Dickin's executors against Stephen Dickin's administratrix, alleging that various dealings and transactions had taken place between the brothers, and that the bond ought to be taken subject to such accounts. This was the suit of *Ward v. Dickin*.

Two accounts in the handwriting of Stephen Dickin, the obligee, were adduced by the executors of George Dickin the obligor, as their evidence, and were proved by them in the cause of *Ward v. Dickin*. These were the exhibits C. and S.

By the decree made at the hearing of the causes, it was referred to the master "to take an account of the dealings and transactions between George and Stephen Dickin, and to inquire whether any accounts had been settled between them, and when and under what circumstances such accounts were settled, and under what circumstances the bond mentioned in the pleadings had been given, with

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liberty to state special circumstances." The exhibits C. and S. were entered as read in the decrees.

The master made his report, which contained the following passage: "The exhibit marked C., proved in the second-mentioned cause, by and on behalf of E. L. Ward and J. Dickin, is partly written in ink and partly in pencil, and is wholly in the handwriting of Stephen Dickin, and was found among his papers by the said Mary Dickin, and is in the words and figures or to the purport and effect following, that is to say. [The account was then set out *verbatim*.] And I consider that the said exhibit C. is to be taken as sufficient proof between the parties (independently of any other evidence given in these causes) as to the accuracy and truth of the several items therein contained, except as hereinafter appears, and as showing the dealings and transactions between them so far as the items therein extend."

The report contained a similar passage as to the exhibit marked S. In the report were some passages relating to the excepted items referred to in the parts which have been mentioned.

The executors of George Dickin, the obligor, took several exceptions to the report, the third of which was as follows: "The master has allowed the said exhibit C. as such proof accordingly, and has charged the estate of the said G. Dickin in account with the estate of the said S. Dickin upon the evidence of the said exhibit. Whereas, the said master ought not to have allowed the said exhibit C. as evidence against the expectants, whereon to charge them with any of the items of account therein appearing."

The seventh exception was in similar language with reference to the exhibit S.

The exceptions now came on to be heard.

Mr. Russell and *Mr. Goodeve*, for the exceptions, cited *Handford v. Handford*, 5 Hare, 212.

Mr. Glasse, for the report.

KNIGHT BRUCE, V. C. The question is not before me whether a document in a dispute between two litigants, which is made evidence by one of them against the other for one purpose, is therefore to be evidence between them for all purposes. I have nothing to do with any such question. Of course, I give no opinion upon it. The question here is this: There are two brothers who have various pecuniary dealings and transactions together, in the course of which a bond is given by one to the other. After the deaths of both, the bond is sought, on the behalf of the estate of the obligee, to be enforced according to the letter. "No," say the representatives of the obligor, "it cannot be enforced according to the letter, because you, the obligee, have, yourself, written accounts between yourself and your brother, which show that an account was pending; and therefore the bond cannot be treated as a bond intended to be used according to the letter." By means of that evidence, either alone or with other evidence, the personal representatives of the obligor succeed in being relieved

Milne v. Gilbert.

against the bond, as a bond to be taken according to the letter, and the accounts between the two estates are directed to be taken on that footing. That is entered on the decree. It is then said, when the accounts are obtained in this manner, and by these means, that the person against whom, for the purpose of obtaining the accounts, this document was used, shall not be allowed to use it for himself. I never heard of such a proposition being advanced before. I believe it to be entirely without foundation. The question is, not what is the weight of the evidence, but whether it is to be evidence; whether it is to be some evidence of the truth of those items, figures, or things mentioned in the accounts. There may be evidence against them which may destroy every portion of them. That is not the question. The question is, whether the master was justified in looking at it as evidence for, or as between the two, or for each, and against each. I am of opinion that he was.

The order made was as follows: Declare, as respects the third and seventh exceptions, that exhibits C. and S. having been made and used at the hearing of these causes as evidence on the part of the exceptants, and having been entered in the decree accordingly, they were, from the nature of the pleadings and the circumstances of the case, properly receivable by the master in evidence, as well against, as for, the exceptants, and with that declaration neither allow nor overrule the exceptions.

MILNE v. GILBERT.¹

March 1, 1851.

Payment out of Court — Prospective Order.

Order made that certain sums which had been ordered to be paid into court, but had not been paid in, might, after they were paid in, be paid out to the party entitled to them.

THIS was a petition praying that certain sums therein mentioned, then in court, belonging to the petitioner, might be paid to him; and also that certain other sums therein also mentioned, belonging to the petitioner, which had been ordered to be paid into court, but which had not been then paid, might, after they were paid in, be paid out to the petitioner.

Mr. Hobhouse, for the petition.

KNIGHT BRUCE, V. C., (after conferring with the registrar,) said that he saw no objection to the prospective order as prayed, and that it might be made.

¹ 20 Law J. Rep. (n. s.) Chanc. 213.
16 *

BACON v. COSBY.

BACON v. COSBY.¹

March 12 and 17, 1851.

Will — Construction — Dying without Children — Election — Evidence.

A testator, by his will, dated in 1837, left his entire fortune to be equally divided between his two daughters A and B, who were his only children, with a declaration that the share of his daughter A should devolve, *in case of her dying without children*, to B and her children. At the date of the will A was married, but had no children; and B was married, and had two children. A died without ever having had a child:—

Held, that A took an absolute interest in the personal estate bequeathed by the testator.

Real estate was settled on A in tail, with remainder to B and her children, and A was absolutely entitled to certain personal estate. A, being so entitled, by one settlement dated the 1st of July, 1841, and made on her marriage, assigned her personal estate to trustees, upon trust for herself for life, with remainder to C for life, with remainder to B and her children; and by another settlement of the same date, also made on her marriage, conveyed the real estate, to which she was entitled as tenant in tail, to trustees, upon trust for herself for life, with remainder to C for life, with remainder to B and her children. A died without having barred the entail:—

Held, that B and her children were put to their election between the life estate in the realty given to C by the second deed, and the benefits in the personalty given to them by the first deed.

Bill against infant defendants. The plaintiff had served defendants' solicitor with notice to produce a particular deed in his possession. The defendants' solicitor sent to the plaintiff a copy of the deed:—

Held, that the production of the copy at the hearing did not amount to secondary evidence of the deed against the infant defendants.

A deed taken to be proved at the hearing by its production, and an affidavit of the handwriting of the parties who had executed it, on the ground of there being before the court, at least, evidence of an agreement to do a thing for valuable consideration.

By a settlement, dated the 17th of February, 1836, and made on the marriage of Mr. Schomberg with Margaret Marie Ashworth, Robert Ashworth, the father of the lady, settled 66,700*l.* on her for life, with remainder for her children, with remainder, in default of children, to himself absolutely. Mr. Schomberg died in February, 1837, and there were no children of this marriage.

Robert Ashworth, at the date of his will, had two daughters only, namely, Mrs. Schomberg, and Emily, the wife of Mr. Sidney Cosby; and Mrs. Cosby had then two children.

Robert Ashworth made his will, dated the 1st of November, 1837, which was as follows:—

"I hereby revoke all wills, testaments, and codicils, that I may have made, and leave my entire fortune equally divided between my two daughters; the part that I may have already given to my youngest being considered to form part of her moiety. I likewise direct that the portion of my said youngest daughter Marie shall devolve, *in case of her dying without children*, to my eldest daughter Emily and her children."

The testator died in December, 1837.

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In July, 1841, Mrs Schomberg married Mr. Wellesley Pole Cosby. On this occasion two settlements were made.

By the first of these settlements, which was dated the 1st of July, 1841, and made between Mrs. Schomberg of the first part, W. P. Cosby of the second part, and G. J. Sullivan, Robert Sullivan, Lord Ashtown, and the Rev. W. Cosby of the third part, Mrs. Schomberg assigned certain items of personal estate, and all other the personal estate to which she was entitled under her father's will, to G. J. Sullivan, R. Sullivan, Lord Ashtown, and W. Cosby, on trust for herself for life, with remainder for her children by that or any other marriage, and, in default of children, upon trust for her sister Emily Cosby for life, with remainder to her children. This deed contained a power for Mrs. Schomberg, if she should survive W. P. Cosby, at any time or times after the decease of W. P. Cosby, by deed or will, and either before or after her marriage with any other husband or husbands with whom she should intermarry, to appoint to such last-mentioned husband or husbands, for all or any part of his or their life or lives, after her decease, the income of all or any part or share of the trust premises thereinbefore settled.

The other settlement also bore date the 1st of July, 1841, and was made between Mrs. Schomberg of the first part, W. P. Cosby of the second part, and G. J. Sullivan, R. Sullivan, and Lord Ashtown of the third part, and contained the same trusts of the real estate to which she was entitled under her father's will; with the same power to give a life estate to any after-taken husband as was contained in the settlement of the personal estate.

In 1843, Mr. W. P. Cosby died.

In 1846, Mrs. W. P. Cosby married Mr. Bacon the plaintiff. Mrs. W. P. Cosby by her will, dated the 7th of September, 1848, appointed the income of her real and personal estate subject to the trusts of the settlement, in favor of Mr. Bacon for his life; and by two deeds-poll, both of the same date, made appointments of such real and personal estate in favor of Mr. Bacon in similar terms to those contained in the will.

Mrs. Bacon died in February, 1850, without ever having had a child.

Mrs. Bacon had not barred the entail, if any existed, in the real estate devised to her by her father's will; so that, in the event of her having had an estate tail in such property, she had had no power to give a life estate in it to Mr. Bacon.

The bill which was filed by Mr. Bacon against the trustees of the settled funds and estates, and Emily Cosby and her children, (who were infants,) prayed for a declaration that the plaintiff was entitled to a life interest in the settled personal estate, and a declaration also that Emily Cosby and her children were bound to elect between their interests in the settled real estate and the benefits given to them out of the settled personal estate by the first-mentioned settlement of the 1st of July, 1841, and for the consequential accounts.

The cause now came on to be heard.

The first question was, whether Mrs. Bacon, under the will of her

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father, was entitled to an absolute interest in his personal estate; or whether, in the events which had happened — her death without ever having had a child — such property devolved to Emily Cosby and her children.

Mr. James Parker and *Mr. Walford*, for the plaintiff, having stated the question, —

KNIGHT BRUCE, V. C. said, that he did not require any authority for the plaintiff's position, and called upon the counsel for the other construction.

Mr. Russell, *Mr. Charles Hall*, *Mr. Wigram*, and *Mr. Karlake* for Emily Cosby and her children. The moiety of the personal estate of the testator given to Mrs. Bacon on her death went over to Emily Cosby and her children. The primary and ordinary meaning of the expression "in case of her dying without children" is her dying without ever having had a child, or dying without leaving a child living at her death. Upon either of these constructions the plaintiff's case must fail. There are certainly many cases in which these words have been held to give an estate tail in realty, and an absolute interest in personalty; but then they have, when so held, been aided by a context, but here there is no context to aid such a construction. In all such cases as the present, the court has struggled to give effect to the gift over in default of children; and here, without the violation of any authorities, such a construction may be put on these words. They cited *Stone v. Maule*, 2 Sim. 490. *De Witte v. De Witte*, 11 Ibid. 41; s. c. 9 Law J. Rep. (N. S.) Chanc. 271.

[In the course of the argument his honor said that, if the gift over had been to a stranger, or if the words "to her children" had been omitted, he thought that the question could not have been argued.]

Mr. Torriano and *Mr. Hislop Clarke*, for the trustees.

KNIGHT BRUCE, V. C., said that, according to the whole course of the decisions, Mrs. Bacon would have been held to have taken an estate tail in the realty, and an absolute interest in the personalty, but for the words "and her children" occurring at the end of the will, coupled with the fact that Emily Cosby had children at the date of the will. This, however, was much too weak and unsubstantial a reason to alter so settled a construction. The plaintiff, therefore, was entitled to a life estate in the personalty.

The second question was this: Mrs. Bacon had by the first settlement given an interest in her personal estate to Emily Cosby and her children; and, by her second settlement, had disposed of real estate, which, from her not having barred the entail, belonged to Emily Cosby and her children.

There would have been an ordinary case of election, but for the circumstances that there were two deeds instead of one.

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Mr. James Parker and *Mr. Walford* contended that the two deeds must be considered as if they had been one, and that, consequently, there was an ordinary case of election.

Mr. Russell, *Mr. Charles Hall*, *Mr. Wigram*, and *Mr. Karlake* contended that the doctrine of election could not be held to apply where there were two deeds. There was no authority whatever for an election in the case of two deeds. They also remarked on the circumstance that there was a variation in the trustees in the two deeds: as, in the first, G. J. Sullivan, R. Sullivan, Lord Ashtown and W. Cosby were trustees; and, in the second, G. J. Sullivan, R. Sullivan and Lord Ashtown, without W. Cosby.

The decision as to this point was given subject to a question of evidence as to the proof of the second settlement, which is stated hereafter.

KNIGHT BRUCE, V. C., said that, subject to the proof of the second settlement, he apprehended that it was perfectly plain that the two settlements, having been made in contemplation of the marriage, must be taken as if they were one settlement, in the same manner as if all the recitals and all the operative parts had been comprised in one deed. A case of election therefore occurred.

The following was the question of evidence:—

The solicitor of the defendants in this case, having been served by the plaintiff with a notice to produce the settlement of the realty, sent to the plaintiff's solicitor a copy of the deed.

Mr. Wigram, at the hearing, on behalf of the infant defendants, declined to admit that there was such a deed.

Mr. J. Parker and *Mr. Walford* contended that, under the circumstances of the case, there was good secondary evidence of the deed.

KNIGHT BRUCE, V. C., said that all that had been done was, that the solicitor of the guardian of the infants had sent to the plaintiff's solicitor what he, the solicitor of the guardian, called a copy of a deed. He could not admit this as evidence of the deed against infants.

On a subsequent day the deed was produced, with an affidavit as to the handwriting of the parties who had executed it. The witnesses to the deed were in Ireland.

KNIGHT BRUCE, V. C., said that, considering that the witnesses were in Ireland, and that, at any rate, there was before the court evidence of an agreement to do a thing for valuable consideration, he would make a decree upon the evidence as it then stood, and not put the parties to further delay or expense.

Bowra v. Wright.

BOWRA v. WRIGHT.¹

March 16, 1851.

Practice — Partition — Infants — 13 & 14 Vict. c. 60.

Form of a decree for partition, since the 13 & 14 Vict. c. 60, where infants are parties to the suits for the partition.

THIS was a partition suit. Some of the persons interested in the estate were infants. A decree was taken according to the prayer of the bill.

The registrar, in drawing up the decree, felt some difficulty as to the form of it, and desired that, as it was the first partition decree which had been made since the new Trustee Act, the matter should be mentioned to the court.

According to the old practice, the infant, by the decree, had a day to show cause.

By the 7th section of the 13 & 14 Vict. c. 60, it is enacted, "That where any infant shall be seized of any lands upon any trust, it shall be lawful for the court to make an order vesting such lands in such persons, in such manner, and for such estate, as the court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a conveyance of the lands in the same manner, for the same estate."

By the 30th section of the act it is enacted, "That where any decree shall be made by the court for the partition of any lands, it shall be lawful for the court to declare that any of the parties to the suit wherein such decree is made are trustees of such lands within the meaning of this act, and, thereupon, it shall be lawful for the court to make such orders as to the estates, rights, and interests of such persons, as the said court might, under the provisions of this act, make concerning the estates, rights, and interests of trustees."

Mr. Stevens and *Mr. Shebbeare*, for the parties.

Knight Bruce, V. C., directed that, instead of giving a day to show cause in the decree, it should be declared that, after the partition should have been made, the infant was to be a trustee, within the meaning of the act, of such parts of the property as should be allotted in severalty to the other parties.

¹ 20 Law J. Rep. (N. S.) Chanc. 216.

 Cockburn v. Green. — Hall v. Hall.

COCKBURN v. GREEN.¹

March 17, 1851.

Practice — Claims — Plaintiffs' and Defendants' Affidavits — Evidence.

In orders made upon claims, the affidavits of the plaintiffs and the defendants will be entered as read, with a direction to the master that the plaintiffs' affidavits are not to be considered as evidence, and that the defendants' affidavits are to be treated in all respects as if they were their answers to bills filed against them.

THIS was a special claim relating to certain matters of account between the plaintiff and the defendant. The terms of an order for a reference to the master were agreed upon.

The plaintiff and the defendant had filed affidavits. A question was suggested by the counsel for the parties, how these affidavits were to be treated in the order.

Mr. Shebbeare, for the plaintiff.

Mr. Elderton, for the defendant.

KNIGHT BRUCE, V. C., said that what he had done in cases on claims, was to order that the affidavits of the plaintiffs and the defendants should be entered as read, with a direction to the master that the plaintiffs' affidavits were not to be considered as evidence of the matters there stated, except by the consent of the defendants, and that the defendants' affidavits were to be treated in all respects as if they were their answers to bills filed against them.

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December 7 and 9, 1850.

Partnership — Receiver — Costs.

Where it is not the object of a suit to obtain a dissolution of a partnership, but, on the contrary, to continue the partnership, it is not the practice of this court to grant, in the course of that suit, a receiver and manager; but the court might depart from this rule if it were shown that, unless a receiver was appointed, the partnership concern was likely to be destroyed by the acts of the defendant.

Where the successful party on an appeal motion obtained the discharge of the order of the court below, but it appeared that he had not instructed counsel in the court below to oppose that motion, but opposed it in person, and did not furnish the court with proper materials for its judgment, the order of the court below will be discharged without costs.

THIS was a motion by the defendant to discharge an order of the master of the rolls for the appointment of a receiver and manager of

¹ 20 Law J. Rep. (N. S.) Chanc. 216.² 15 Jur. 363. 3 Mac. & Gor. 79.

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a partnership business. It appeared that in an early stage of this suit an order had been made by the master of the rolls for an injunction restraining the defendant from debarring the plaintiff, his partner, from the enjoyment of certain partnership rights, according to the terms of the partnership articles. This injunction having been systematically disregarded by the defendant, the plaintiff gave a notice of motion before the master of the rolls for the appointment of a receiver and manager of the copartnership business, and that the defendant might be committed for breach of the injunction. The defendant did not meet that motion by any affidavits in answer to those upon which the motion was made, and did not instruct counsel, but appeared in person. The plaintiff's counsel waived so much of the motion as asked for the commitment of the defendant for breach of the injunction, and the master of the rolls made an order for the appointment of a receiver and manager of the partnership business. The object of the suit is fully stated by the lord chancellor in his judgment. The bill did not pray a dissolution, but, on the contrary, that the articles might be performed and carried into execution.

Lloyd and Hislop Clarke, in support of the motion, cited *Oliver v. Hamilton*, 2 Anst. 453; *Waters v. Taylor*, 15 Ves. 13; *Harrison v. Armitage*, 4 Mad. 143; *Forman v. Homfray*, 2 V. & B. 329; *Goodman v. Whitcomb*, 1 J. & W. 589; *Marshall v. Colman*, 2 J. & W. 266; *Richards v. Davies*, 2 Russ. & M. 347; and *Smith v. Jeyes*, 4 Beav. 503; and contended that it was well established that the court would only appoint a receiver over a partnership business where a dissolution is prayed.

Bacon and Welford, contra, contended that the cases referred to by the other side only contained *dicta* for the proposition, that the court would only appoint a receiver over a partnership business where a dissolution was sought, but that there was no authority for the proposition that, for the purposes of *interim protection*, the court would not appoint a receiver to protect the partnership property; that the case of *Const v. Harris*, Turn. & R. 496, was a distinct authority in favor of such an appointment; that there Lord Eldon, in giving judgment, said, (p. 525,) "The most prominent point on which the court acts, in appointing a receiver of a partnership concern, is the circumstance of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership as he who assumes that power himself enjoys;" and that in the present case there was clear evidence of the exclusion of the plaintiff by the defendant from his share of the management of the partnership; and that unless the court could appoint a receiver, there was no means whereby the partnership property could be protected. They relied on the cases of *Fairthorne v. Weston*, 3 Hare, 387; *Richardson v. Hastings*, 7 Beav. 323; *Miles v. Thomas*, 9 Sim. 606; *Wilson v. Greenwood*, 1 Swanst. 471; *England v. Curling*, 8 Beav. 129; Dan. Chan. Prac. 1597-8, Headlam's ed., referring to *Skipp v. Harwood*, 2 Swanst. 586, note; *Maleolm v. Montgomery*, 2

Mol. 500; and *Thomas v. Davies*, 11 Beav. 29, as establishing the principle, that where a suit is instituted to compel a partner to act according to the partnership articles, the court will make such a decree or direction as it may see necessary to carry out its decree for specific performance of the articles, even to the appointment of a receiver.

Lloyd, in reply.

LORD CHANCELLOR. Upon the best consideration that I can give to this case, I think the order that has been made cannot be supported. It does not appear to me to be consistent with the course of authority that has prevailed in the courts, and I am not surprised at that, when my attention is directed to the extreme difficulty which must result from the prosecution of such an order under circumstances like the present. It is extremely unfortunate for the court, when applications are made which depend upon certain principles of law upon which the jurisdiction of the court is founded, that persons, who are totally incompetent to bring before the court what has been the state of the authorities, or to show how they apply to the circumstances of the case, should attempt to conduct their own case; they are wholly incapable of doing justice to it, or calling the attention of the court to the circumstances material to its decision. In this case it appears, that, in the first instance, a motion was made for an injunction, and afterwards a motion to commit for breach of that injunction, and for the appointment of a receiver. What passed in reference to the granting of the injunction does not very distinctly appear beyond this, that the allegation on the part of the plaintiff was not satisfactorily answered on the part of the defendant, namely, that the defendant had not observed, but had violated, some of the articles of the copartnership. He was, therefore, enjoined against the continuance of that breach of the articles with which he was charged, so far as it was supposed to be made out. With the propriety of that injunction, either as to the circumstances under which it was granted, or as to its particular terms, I do not think the court has at present any thing to do. I will, therefore, assume, for the purpose of the present motion, that the injunction was properly granted, and that if it was disobeyed there was a known remedy, which it was open to the plaintiff to obtain against the party so disobeying; but that could not give any power, according to the practice of the court, to abandon that remedy, and to substitute another remedy of a totally different nature. I cannot conceive, that if a party is not prepared to ask for a commitment for breach of an injunction, he can ask to substitute for that remedy the appointment of a receiver and manager. The rights of those different remedies are essentially distinct, and depend upon totally different grounds and circumstances. The motion I consider was made before the master of the rolls for a receiver and manager; upon that occasion, in all probability, the case was opened, on the part of the plaintiff, by presenting to the mind of the master of the rolls certain breaches of the articles of co-

partnership, of such a nature as might or might not furnish a ground for the plaintiff to pray a dissolution. I think it extremely probable (though not likely to be so intended) from the result, that the master of the rolls' attention was directed to those acts of alleged misconduct on the part of the defendant, and that it was assumed that the plaintiff was seeking for a dissolution of the partnership upon those grounds, and that the distinction between the injunction for breach of the articles of copartnership, and the appointment of a receiver and manager with a view to dissolution, was not presented to the mind of the master of the rolls. The defendant was incompetent to do it, and the plaintiff's object, and the object of his counsel, was to call the attention of the court to a totally different view of the case. If the attention of the master of the rolls had been called to the state of the record, and to the application of the general principles which have prevailed in the appointment of receivers or managers, I cannot but think, from my knowledge of the extreme care and accuracy of that learned judge, that if he had intended to overrule any of the previous decisions, he would have stated distinctly his intention so to do, and have stated ample grounds to justify the conclusion; but nothing appears to have fallen from him tending to show that he at that time intended or contemplated introducing any decision in the slightest degree inconsistent with what had been the previous course of proceeding adopted by the court. Now, it appears that this is a bill in which the plaintiff complains that the articles of the partnership have not been observed; but he does not make that complaint the foundation of a prayer that he may be relieved from the partnership; on the contrary, his sole object is to establish the partnership, and to enforce its being carried on according to its articles.

It is, therefore, not a case which at all falls within that class of decisions where a party, who complains of a breach of the articles of partnership, elects to make that complaint the foundation of a prayer for dissolution. The general principle resulting from all the authorities, as far as I can collect, appears to be, that breaches of articles of partnership are not necessarily the foundation of a dissolution, but that when those breaches are of such a nature as to show that a partnership cannot be carried on for the benefit of the parties according to the original intention, as apparent from the articles, inasmuch as one side has put an end to the partnership according to the original agreement and articles, in such a case the other party may be relieved from the partnership, although there is no express provision that the partnership should determine upon the breaches complained of, or any other. This is done upon the ground that virtually the parties have determined the partnership, or at least that one has, so far as he is concerned, withdrawn himself from the partnership, according to the articles, and that the other, by reason of such conduct, claims to be relieved, or prays a dissolution. In every case, therefore, when complaints are made of breaches of the articles, it must be seen with what view those complaints are urged, whether they are urged with a view of making them the foundation of a dissolution, or of a decree enforcing and carrying on the partnership according to the original

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terms, and preventing, by proper means, those breaches recurring which have before happened by reason of the conduct of one of the parties. Now, in this case, the plaintiff prays the establishment of the partnership according to its terms, that is to say, a specific performance of the articles. In the course of the suits he finds it necessary to move for an *interim* injunction, and he shows reasonable grounds that it is proper for his safety to secure, as far as can be secured under the authority of the court, the partnership being carried on until the hearing, according to the articles. Having got an injunction, he subsequently becomes dissatisfied with the state of things notwithstanding that injunction, and he then comes and asks for a receiver.

Now, is his suit in such a form, and has he presented his complaint in such a manner, as to entitle him to ask for this species of relief? Are the acts which he has made the foundation of his application of such a nature as to show that when the hearing comes on it will be nugatory for the court to decree a specific performance of the articles, according to the prayer of the bill, which must be the foundation of that relief? Has he shown that the acts that have occurred are of such a nature, that although, at the time he presented his bill and framed his prayer for relief, his object was to establish the partnership, yet, by reason of the subsequent conduct of the defendant, the state of things is altered, and that the partnership can no longer be carried on, with reasonable advantage, according to the original terms? He might have amended his bill, and adapted his prayer to any state of circumstances, which would justify any variation he might be advised to make; but with the prayer standing for a specific performance, or, in other words, for the establishment and continuance of the partnership, he comes and asks for a receiver and manager to be appointed. Having attended to the various cases which have been cited on this question, they appear to me to be all one way, down to the very last case that has been referred to, of *Smith v. Jeyes*, 4 Beav. 503. I find but one case in which any expression is at all equivocal, as far as I can judge. I do not mean to say that from some of the cases sentences might not be extracted upon which, when taken apart from the context, and considered without reference to the subject matter to which they were addressed, it might be possible to found a doubt; but taking the context in all the cases, and considering what falls from the court as construed and as made intelligible by that context, I do not see that any doubt exists. Without going into the particulars of the case of *Oliver v. Hamilton*, 2 Anst. 453, I do not find that the court there laid down any thing which seems to me to be inconsistent with all the subsequent authorities, or which at all impugns the general doctrine which I conceive to be clear, that where it is not the object of the suit to obtain a dissolution of the partnership, but, on the contrary, to continue the partnership, it is not according to the practice of the court to grant, in the course of that suit, the appointment of a receiver and manager.

Two cases were mentioned that appear to have some expressions in them which seem to be favorable to the plaintiff, namely, *Wilson v.*

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Greenwood, 1 Swanst. 471, and *Goodman v. Whitcomb*, 1 J. & W. 569. With respect to the former, what there fell from Lord Eldon clearly meant that a party might so misconduct himself by excluding his fellow-partner from a proper participation in the management of the business as might furnish a ground for dissolution; but that statement occurs in the course of observations all directed with reference to the principle that a receiver and manager was to be appointed in reference to dissolution; and then, having his mind directed to the subject of dissolution, his lordship referred, amongst the causes of dissolution, to the exclusion by one partner of the other. The case of *Goodman v. Whitcomb* is perfectly plain and intelligible, and shows that Lord Eldon had not at all altered his view upon the matter, and removes any doubt or ambiguity as to the meaning of the expression to be found in the other case. In *Wallworth v. Holt*, 4 My. & C. 619, the point that arose was of a very distinct nature from that now under discussion. The partnership there had ceased to be carried on, the concern was insolvent, and the parties were indisposed to raise any capital. Under these circumstances the property of the partnership was likely to be lost to all parties between the period of the motion and the hearing, unless the court interfered to preserve it; and although the bill had not the word "dissolution" in it, yet it was plain that its object and necessary effect was to put an end to the concern.

The case, therefore, stood upon precisely the same basis as if the bill had been filed exclusively for the purpose of the dissolution and winding up of the concern. In *Const v. Harris*, Turn. & R. 496, which is the only case that introduces any ambiguity, there is certainly an expression that would appear favorable to the plaintiff. Lord Eldon says, "The most prominent point on which the court acts in appointing a receiver of a partnership concern is the circumstance of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership as he who assumes that power enjoys himself." Now, the receiver that was asked for in that case was a receiver wholly unconnected with the management: he was to receive either the rent under a lease, if the parties thought fit to adopt that lease, or the admission money taken at the entrance of the theatre, supposing the lease was repudiated or not acted upon, and he was to apply it according to certain terms and provisions which the parties themselves had provided. The case itself was a peculiar and extraordinary one: the receiver there had a simple duty to perform; it may be considered as purely ministerial; he was to receive all that the persons paid for their entrance to the theatre, and to apply it according to a specific arrangement that the parties had before directed, and he was to do that until the hearing of the cause. The case appears to me to be very distinguishable in its circumstances from the other cases which have been referred to, and, taking the expression there used as applied to the receiver there asked for, it does not become applicable to the case now under discussion. I can readily conceive a case where the question might be one of the receipt of money only, and where, if the

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money only was allowed to be received by the parties, it would not be applied to its proper purposes; and thus, at the hearing of the cause, there would be a failure of justice, unless the court interposed in the mean time. Thus, it seems to me that the case of *Const v. Harris* is not to be taken as an authority at all inconsistent with the general course of decision that has prevailed. Then, if I am correct in the conclusion to which I have come, that by the rule and practice of this court a receiver or manager is only granted where it is ancillary to the object of dissolution, I need not go into every possible case which may arise, but have only to act upon that rule. The general doctrine belonging to all courts is, that a principle once established is to be adhered to and applied to new cases, so as to give effect to it in the best possible way. Thus, a case might arise where a party was so conducting himself, that, unless a majority was appointed before the hearing, the partnership concern might in the mean time be destroyed; and the court would, no doubt, apply the principle to that case. Such, however, is not the case before me, where there is a partner against whom insolvency is not charged, who has brought in the whole of the capital, and who, it is not suggested, is not perfectly competent to answer for any money that may come to his hands. It is said that he has applied a part to his own purposes; but how far he may have a right so to do, does not appear. In the absence of all explanation, I have simply before me the case of a person who is under the peril of an injunction against the misapplication of the funds, against whom there is no motion to commit for a breach of that injunction, and who is not shown to be so circumstanced as to make any interference essential to the security of the parties pending the cause until its hearing. It seems to me, therefore, there is no circumstance in this case which warrants a departure from what I conceive to be the established principle of the court. It appears to me, also, that granting a manager, instead of doing that which is the object of granting a receiver or manager to do, would, in truth, be destructive of it, for it is perfectly impossible that this concern should be carried on with that advantage which both parties have a right to expect until the hearing, to which time it is contemplated that the partnership shall continue. I cannot adopt the view which has been presented to me in the course of the argument, of that qualified sort of management which would leave the parties to manage the concern for themselves, under the supervision of a manager appointed by the court. It appears to me, that interference with the management in any substantial degree would be a contempt of the court, punishable just as much as a breach of the injunction. The business to be carried on is one which requires personal skill, and it seems to me that the manager cannot by possibility conduct it in such a manner as to preserve it entire for the benefit of the partners after the hearing of the cause, supposing a decree shall be made to carry it on. I think, therefore, that from the circumstance of the attention of the master of the rolls not being called to the state of the record, and to the prayer of the bill being exclusively or for the main part directed to the establishment of the partnership and to the carrying it on, and as the

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acts imputed to the defendant are by no means destructive of the partnership, in the sense that a decree would not be available for carrying it on, by reason of his intermediate acts, no sufficient grounds were laid before the master of the rolls to warrant the order that is now complained of. The appeal must therefore be allowed, and the order of the court below must be discharged.

Lloyd asked that the same order should be pronounced as should have been made in the court below, namely, to refuse the motion with costs.

LORD CHANCELLOR. I do not think there should be any costs below. Parties have no right, at the peril of their opponents, to come into court totally unprepared, and to occasion expense for want of the court being put in possession of the proper materials for forming its judgment. There are adequate means for the protection of such parties; and if they choose to rely upon their own efforts, the court will aid them to the uttermost of its power, but they must do this at their own peril. I therefore think, that if a party puts his opponent to expense for want of the court having before it that assistance without which justice cannot be safely administered, he should do that at the risk of costs; and that, therefore, the original motion must be discharged, without costs.

 VINCENT v. THE BISHOP OF SODOR AND MAN.¹

March 27, 1851.

Will—Exercise of Power of Appointment—Publication.

By deed, estates were settled to the use of such person or persons, in such parts, shares, and proportions, manner and form, and for such ends, intents, and purposes, and under and subject to such powers, provisos, and limitations, as S. S. should by deed, as therein mentioned, or by her last will and testament in writing, or any writing purporting to be or in the nature of her last will and testament, to be by her signed and published in the presence of and attested by two or more credible witnesses, and which she was thereby authorized to make and execute, direct or appoint. S. S., by will, dated in 1826, devised the estate to certain relations, and appointed executors, and signed and sealed the same. The attestation clause was this: "Signed and sealed in the presence of, H. P., of," &c., and M. E., housekeeper to Mrs. I. No attestation was contained of the publication. The testatrix died in the same year:—

Held, after a case had been sent first to the Court of Common Pleas, and afterwards to the Court of Exchequer, in conformity with the certificates of both courts, that the power was well exercised.

THIS suit was originally instituted in the Court of Chancery, in 1843, to obtain a decision whether the will of Mrs. Ireland, the widow of the late Dean of Westminster, was a good or bad appointment, in execution of the power given her by her marriage settlement. The cause was heard on the 4th of July, 1844, before Sir James Wigram,

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V. C., who then made an order that the trustee of the fund, which then represented the property over which the power existed, the defendant, the then Bishop of Sodor and Man, now Bishop of St. Asaph, should receive the dividends on the same fund, and pay the same into court, after deducting any charges, before the commencement of the suit, and that the stock should be transferred to the accountant general, the dividends to be accumulated; and that the bishop and the defendant Barnes, two of Mrs. Ireland's executors, should be at liberty to take proceedings to prove her will, as they might be advised. This order was complied with, and proceedings were taken, first, in the Prerogative Court, and then, on appeal, before the judicial committee of privy council; and ultimately the will was, by the advice of the judicial committee, admitted to proof, and was accordingly proved by the bishop and Mr. Barnes, on the 4th of March, 1847. During the proceedings in the Prerogative Court, evidence was gone into on the articles, and also on cross interrogatories, to show that, in fact, Mrs. Ireland did sign and publish her will, in the presence of two witnesses. Admissions were entered into by both sides, and on the 7th and 8th of June, 1847, the cause was heard on further directions before Sir James Wigram, V. C., when, after the argument, the court directed the following

Special Case for the Opinion of her Majesty's Court of Common Pleas.

Prior to, and in contemplation of, the marriage then intended, and soon afterwards solemnized, between the Rev. John Ireland, clerk, and afterwards Dean of Westminster, deceased, and Susanna Short, spinster, also deceased, by indenture of lease and release and settlement, the release and settlement bearing date the 28th day of January, 1794, a certain freehold estate, held for certain lives still in existence, and limited in its creation to the lessee, his executors, administrators, and assigns, was conveyed to the trustees of the said settlement, their executors, administrators, and assigns, to certain uses in favor of the said John Ireland and Susanna Short, and their issue, which have since failed; and after the determination thereof, to the uses following, that is to say, to the use of such person or persons, in such parts, shares, and proportions, manner and form, and for such ends, intents and purposes, and under and subject to such powers, provisoes, and limitations, as the said Susanna Short shall at any time or times during and notwithstanding her intended coverture, by any deed or deeds, writing or writings, with or without power of revocation, to be by her sealed and delivered, in the presence of and attested by two or more credible witnesses, or by her last will and testament, in writing, or any writing purporting to be or in the nature of her last will and testament, to be by her signed and published in the presence of and attested by the like number of witnesses; and which deed or deeds and will she is hereby authorized to make and execute, notwithstanding her said intended coverture, direct or appoint, and in default of and subject to such direction or appointment, to the use of the said John Ireland, his executors, administrators, or assigns, for their own use and benefit, and to no other use, end, intent, or purpose whatsoever.

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The said Susanna Ireland, formerly Susanna Short, made and executed her last will and testament in writing, or appointment in writing in the nature of a will, dated the 17th of February, 1826, whereby she devised the said estate comprised in the said settlement, after the death of her said husband, to certain of her relations, in her said will named, and she appointed her executors, and concluded her said will in the words and figures and form following, that is to say:—

“I appoint for executors of this my will, the Rev. Thomas Vowler Short, the Rev. William Short, (my two nephews,) and Ralph Barnes, Esq., attorney at law, Exeter. SUSANNA IRELAND. (L. S.) February 17, 1826. Signed and sealed in the presence of Humphrey Pritchett, apothecary, 13 Great Queen Street, Westminster; Mary Eames, housekeeper to Mrs. Ireland.”

The said Susanna Ireland departed this life on the 1st of November, 1826, and in the lifetime of her said husband, without having altered or revoked her said will, which has been duly proved, pursuant to an order of her majesty in council, made on the 4th of March, 1847, confirming a report of the judicial committee of the privy council in a case of appeal from a sentence of the Prerogative Court of the Archbishop of Canterbury. The said John Ireland has also departed this life. In this suit, which is depending in the Court of Chancery between the executors of the said John Ireland and the executors of the said Susanna Ireland, and other persons interested in their respective estates, it has become necessary to determine whether the said will of the said Susanna Ireland is a valid exercise of the power of appointment of the said estate which was so given or limited to her by the said release and settlement of the 28th of January, 1794, as aforesaid. Humphrey Pritchett, one of the attesting witnesses to the said will of the said Susanna Ireland, departed this life on or about the 16th of August, 1828, leaving Mary Eames, the other attesting witness to the said will, him surviving, who is still living.

Certain witnesses were examined in the said appeal, and their testimony has been made evidence in this case, and by the testimony of two such witnesses the handwriting of the said Humphrey Pritchett was proved. The said Mary Eames, one of said witnesses, deposed as follows, that is to say, to the third article, “I lived as housekeeper with Mrs. Ireland, the deceased in this cause, from the 19th of March, 1817, until her death, in the month of November, in the year 1826. During that period I acted as the housekeeper to her husband, the late Dr. Ireland, and herself, and always attended upon the deceased, and was her confidential servant. Between Christmas, 1825, and the 17th of February, 1826, the deceased said to me several times that she should make her will, and that the dean (meaning her husband, Dr. Ireland, who was Dean of Westminster) wished her to make her will. The said deceased suffered from dropsy, and after Christmas, 1825, she was under the impression that she should not live very long. Immediately prior to the said 17th of February, the deceased said to me, ‘Eames, I shall make my will, but I cannot write it all at once;’ from which I infer, though I have no further knowledge of the fact,

that she was occupied on more than one day in so doing, exclusive of the said 17th of February. At about ten o'clock in the morning of that day, I went to the deceased in the drawing-room of the deanery house, Westminster, where she and the dean were then residing, to receive orders for her dinner, and she then said to me, 'Eames, I have a right to make my will, under my marriage settlement;' adding, 'Do not go out of the way this morning, as I shall want you to sign it.' At about between twelve and one o'clock that day, Mr. Pritchett (the deceased's medical attendant, and who was in attendance on her as such at that time) called on the deceased, and saw her in the drawing-room. I thereupon went into the drawing-room to the deceased and Mr. Pritchett. The deceased had told me in the morning, at ten o'clock, that she should want me to sign her will when Mr. Pritchett came, and that was the reason why I then went up to the drawing-room. I went into the drawing-room at the same time that Mr. Pritchett did so, and the deceased thereupon, addressing both of us, said, 'I wish you to sign my will, as I have the power of making my will, under my marriage settlement,' or words to that effect. Mr. Pritchett then sat down, and I stood at the table. The deceased, who was sitting at the table, with her will before her, then finished her will, by writing two or three lines at the end of it. I think she must have written as much as two or three lines, for it took her some little time to do it. As soon as the deceased finished writing, she said to Mr. Pritchett and me, 'Look, and see me sign my will;' she then wrote her name at the end of her will; she then put her finger on the seal on the will, and said to us, 'This is my last will and testament.' I have left out one word, for what she then said to us was, 'I declare this to be my last will and testament.' The deceased then asked Mr. Pritchett to sign her will, and he did so; then she asked me to sign her will, and I signed it after Mr. Pritchett, and as I was doing so, Mr. Pritchett asked me to name that I was Mrs. Ireland's housekeeper, and I did so, by adding the words 'housekeeper to Mrs. Ireland' to my signature on the will. As soon as this was done, the deceased folded up the will, and enclosed it in a piece of writing paper, and sealed it up, and wrote on the paper thus enclosing it, 'My will,' and placed it in her writing desk, saying to me as she did so, 'When I am dead, Eames, tell the dean where to find my will.' Mr. Pritchett then asked the deceased how she was, and finding that she had nothing at that moment to say to him about her health, took his leave. I remained with the deceased a short time afterwards, and she gave me some domestic orders, after which I also left her, and went down stairs. No one was present on the occasion besides the deceased, Mr. Pritchett, and myself. The deceased was of perfectly sound mind at the time, and perfectly capable of making her will. She at that time, and at all other times of my acquaintance with her, until within a fortnight of her death, used to manage her household affairs, and to settle her weekly bills with me in the most correct manner possible; and I then, and at all other times of my acquaintance with her, considered her perfectly capable of managing her own affairs. There was some sealing wax on the will before I saw it; and when

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the deceased sealed it, as I have deposed, she put a little more sealing wax on it, using for that purpose a small taper which stood on the drawing-room table, and in the sight of Mr. Pritchett and myself she made the impression of her initials on the sealing wax with a small seal hanging to her watch, but rather larger perhaps than the seals which ladies use at the present day. She then put her finger on the seal on the will, and said to Mr. Pritchett and myself, 'I declare this to be my last will and testament,' as I have already deposed. The will now produced to me by the examiner, marked with the letter A, (the same being the articulate scrip, marked A, propounded in this cause,) is the very will of which I have been deposing. The same was executed by the said deceased on the aforesaid 17th of February, 1826, the day of the date thereof, in my presence, as I have now deposed. The name and addition, 'Mary Eames, housekeeper to Mrs. Ireland,' appearing subscribed on the said will as those of an attesting witness thereto, are my name and addition, and of my handwriting and subscription." To the fourth article, "I have seen the deceased write, and sign her name on very many occasions; I saw her write as often as three or four times a week on an average, during the whole period of my being in her service. I am well acquainted with her handwriting. I have now inspected her aforesaid will. The whole body, series, and contents of it appear to me to be of her handwriting, and I have no doubt that they are so. The names 'Susanna Ireland,' subscribed thereto, appear to me also to be of her handwriting and subscription, and I should have known them to be such independently of having seen the deceased subscribe the same, as I have deposed. The date thereof, 'February 17, 1826,' the word 'be,' interlined between the thirteenth and fourteenth lines of the first page thereof, and the name 'Bartholomew,' also interlined between the seventeenth and eighteenth lines of the same page, appear to me also to be respectively of the handwriting of the deceased, and I have no doubt that they are so."

The same witness was examined on the interrogatories: 1. "It is nineteen years since the death of Mrs. Ireland, the deceased in this cause. She did die in the same year in which she signed the paper in question in this cause. She lived for near nine months after having signed that paper. At the time I affixed my name to that paper, I did know that it was of a testamentary nature. I first mentioned that I had signed such a paper to a young woman, then my fellow-servant, named Frances Goodall; I mentioned it to her at the time, as we were together in the deceased's house. The deceased published the paper or scrip propounded as her last will, by saying to Mr. Pritchett and myself, (as deposed in chief,) 'I declare this to be my last will and testament,' as she put her finger on the seal of it, as predeposited. Those were the words made use of by her, signifying her publication of it. I did not see the deceased write that paper; I saw her write only two or three lines at the conclusion of it, as I have deposed. I did not at the time I put my name to it know its contents, but on the following day the deceased told me 'that she had left her money to her own family.' I can recollect that the deceased, on the

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occasion of her signing the paper in question, said to Mr. Pritchett and myself, 'You look and see me sign my name;' she so expressed herself before she subscribed her name to the said paper, and immediately afterwards she repeated the same thing, by saying to us, 'You have seen me write my name,' as she asked us to sign the will as witnesses. My fellow-subscribing witness (Humphrey Pritchett) was present when she so expressed herself." 2. "The paper propounded in this cause was sealed in my presence; it was sealed by the deceased. Sealing wax was affixed on it as a seal before the deceased subscribed her name; and again, after she had done so, she made a fresh seal on it, and impressed the initials of her name on the wax with her seal. She made the fresh seal by putting more sealing wax on the will, on the same place where the sealing wax had been previously affixed. She then sealed the will by putting her finger on the seal, and saying to Mr. Pritchett and myself, 'I declare this to be my last will and testament,' as I have deposed in chief. The said Humphrey Pritchett was present when the paper was so sealed. I have now been again shown the said paper; the interlineation 'and sealed,' appearing in the attestation clause, was written in my presence by the deceased, before I and my fellow-subscribing witness signed our names to the said paper. I remember perfectly well that the deceased said, 'O, I have omitted putting sealed,' and that she put in the words 'and sealed,' as they now appear in the said will. She did that after she had signed, sealed, and published the will herself, and before Mr. Pritchett and I signed it; when she asked us to sign it, she read over the words, 'Signed in the presence of,' (appearing on the said will,) to Mr. Pritchett, for him to tell her if they were correct, and thereupon it was that she discovered that she had omitted the word 'sealed.'"

The question for the opinion of the court is, whether the said Susanna Ireland's will, or appointment in the nature of a will, was a due execution of the said power of appointment, so limited or given to the said Susanna Ireland by and contained in the said indenture of release and settlement of the 28th of January, 1794.

The case was argued before the Court of Common Pleas, when judgment was, on the 26th of January, 1849, deferred, and on the 5th of May following, a certificate was given, by which their lordships declared that, in their opinion, the power was well executed.

On the 5th of November, the cause came on upon the equity reserved, and, after argument, Sir James Wigram, V. C., delivered judgment on the 19th of the same month, as follows: "In this case a power was given which might be executed by deed, which I need not refer to, and which also might be executed by will, which was required to be signed and published by the donee, in the presence of and attested by two or more credible witnesses. The donee has executed, or attempted to execute, this power by will, which is signed and sealed in the presence of and attested by the requisite number of witnesses, publication not being expressed either in the attesting clause or in the body of the instrument. The cause came on before this court, and a case was sent for the opinion of the Court of Common Pleas; a certificate has been returned, in which all the learned

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judges concur in favor of the valid execution of the power, but, unfortunately, no reason is assigned for the opinion they have given. If the case of *Wright v. Wakeford*, 17 Ves. 454, which I mention as the representative of a class of cases, had never been decided, I should not, I think, have had much difficulty in deciding this case in favor of the valid execution of the power. Again: taking *Wright v. Wakeford*, and the class of cases which it represents, as a sound decision, I should not, I think, have had much difficulty in applying *Wright v. Wakeford* to the present case, if it were not for the subsequent decision of the House of Lords in *Burdett v. Spilsbury*, 10 Cl. & Fin. 340, and for the decision of the vice chancellor in the cases of *Mackinley v. Sison*, 8 Sim. 561, and *Bartholomew v. Harris*, 15 Sim. 78. These cases appear to me to have introduced a difficulty as to the proper decision to be come to in the present case, which would not have existed independently of those cases. If the principle on which *Wright v. Wakeford* was decided be this, that the instrument creating the power requires that the attesting witnesses should actually narrate upon the instrument executing the power what acts of the donee they attest, and that the court, in requiring such a narrative, were merely executing the express direction of the donor, there might not be much difficulty in applying the principle to the present case; but if that be the principle, it is difficult to see how the court can dispense with the narrative in the case of a general attestation, any more than in the case of a particular attestation. If, however, the language of several of the judges who assisted in the House of Lords in *Burdett v. Spilsbury*, and the language of the noble and learned lords who gave their opinions in that case, is to be taken as an exposition of the law, it will be difficult to escape from the conclusion, that, in the case of a general clause of attestation, they thought the narrative might be dispensed with to the extent, at least, of holding that a jury might presume that the witnesses saw those acts done which the donee of the power, in the instrument executing the power, expressed an intention to do, although there be no evidence that the witnesses were cognizant of the contents of the instrument containing the power.

"Indeed, it would be difficult to escape from the conclusion that they were of opinion that the witnesses might be examined to prove what acts of the donee they did, in fact, attest; that is, in the case of a general attestation. Another difficulty has always occurred to me upon the case of *Burdett v. Spilsbury*, but which difficulty, looking at the high authority of those who advised on and decided that case, I cannot consider as well founded. It is said in that case, that the attesting clause may be read in connection with what was called a *testimonium* clause. That argument supposes the witnesses to have read, or have been informed, of the contents of the *testimonium* clause, which, however, is part of the will, and not of the attesting clause, and of which the attesting witnesses are never presumed to know the contents; and to this must be added the observation, that the *testimonium* clause in that case of *Burdett v. Spilsbury*, mentioned only 'signing and sealing,' and not publishing. The word 'publish'

was, indeed, used by the testatrix in that case, Mrs. Skinner, at the beginning of her will, and the witnesses therefore must, in that case, have been presumed to have read or known the contents of the whole will; but at the time the testatrix made use of the word 'publish,' she clearly did not do the act which the donor of the power required, for the substance of the will follows the clause in which the word 'publish' occurs. Mr. Justice Maule, in advising the house, suggested that, according to the true construction of the will in *Burdett v. Spilsbury*, all that the donor required was, that the will should be attested, and not the formalities, which he said would distinguish the case of *Burdett v. Spilsbury* from *Wright v. Wakeford*; and the noble and learned lords who gave their opinion in the case appear to me not to have disapproved of, but to have been disposed to adopt, the distinction suggested by Mr. Justice Maule; but they distinctly disclaimed putting their decision on that ground. The cases of *Mackinlay v. Syson* and *Bartholomew v. Harris* appear to me to be important authorities in support of the certificate in the present case; but it will be difficult to reconcile those cases with the case of *Moodie v. Reid*, 1 Mad. 516, and other cases, in which it has been held that the publication is to be a distinct act, and not, as the vice chancellor appears to have thought in *Mackinlay v. Syson*, a thing to be inferred from the mere fact that the deed required the witnesses to attest something. I have not, in the present case, the advantage of knowing on what grounds the learned judges who have sent me their certificate have decided the present case. I find myself in this difficulty—all the opinions given in *Burdett v. Spilsbury* appear to me to profess to save whole *Wright v. Wakeford*. I do not even except Mr. Justice Maule, who evidently felt disposed to think that case ought to be excepted. In *Burdett v. Spilsbury*, the word 'publish' was found in the instrument executing the power, and stress was laid upon that circumstance. In this case the word 'publish' is not found in the instrument executing the power, and I am left in doubt whether the certificate has been founded on the distinction suggested by Mr. Justice Maule, to which I have already adverted; or whether it has been given upon the authority of *Mackinlay v. Syson* and *Bartholomew v. Harris*; or whether it has been given upon the ground, strongly insisted on in argument before me, that the seal of the donee (a formality not required by the donor) was to be deemed a publication; or whether they have proceeded upon any ground which has not been suggested in argument. Considering that this is a case to be determined by a court of law, it is of very great importance my knowing upon what ground the court of law has proceeded. I cannot, with any satisfaction to myself, confirm this certificate without knowing the reasons upon which it is founded; and I do, though with great reluctance, decide that this case should be sent again to a court of law. I wish the parties, however, distinctly to understand, that I do not myself do this upon the ground that I think the certificate may not be supported. The law is really in such a state of uncertainty, that for me to confirm it in the present instance would not be adopting the opinion of the

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court of law, but would be giving an opinion of my own. The same case must go to some other court."

The minutes of the order were these: "Let the case on the will of Susanna Ireland, in the pleadings named, which, by the order of this court, dated the 8th of June, 1847, was made for the opinion of the Court of Common Pleas, and on which they certified their opinion, dated the 5th of May, 1849, be sent for the opinion of the barons of her majesty's Court of Exchequer. And upon the case so settled, let the question be, 'Whether the said Susanna Ireland's will, or appointment in the nature of a will, was a due execution of the power of appointment limited or given to the said Susanna Ireland by and contained in the indenture of release and settlement of the 28th of January, 1794, in the pleadings mentioned.' And the barons of the said Court of Exchequer are to be attended with the said case; and the court doth reserve the consideration of all further directions until after the said barons shall have made their certificate, and thereupon such order shall be made as shall be just."

Before the Court of Exchequer the case was argued by *Malins*, for the plaintiff, and by *Humphrey*, for the defendants, on the 3d of May, 1850. On the 8th of July, Alderson, B., in the absence of the chief baron and Parke, B., read the following judgment: "This case of *Vincent v. The Bishop of Sodor and Man* was sent to us by the direction of Vice Chancellor Wigram, for the purpose of our certificate, and we shall certify to the vice chancellor that we are of opinion that the power was well executed. By the settlement on the marriage of the Dean of Westminster with Miss Susannah Short, a power was given to that lady, during her coverture, by any deed sealed and delivered in the presence of and attested by two or more witnesses, or by her last will signed and published in the presence of and attested by two or more witnesses, to appoint certain property therein mentioned to such uses as she might choose. It appears that by her will, dated the 17th of February, 1826, she made such appointment; the attestation clause is as follows: 'Signed and sealed in the presence of Humphrey Pritchett,' described, 'and Mary Eames,' described also. The question is, whether this is sufficient. It depends upon the state in which the law was left by the case of *Doe d. Burdett v. Spilsbury*, in the House of Lords. We are unable to see how, after that decision, the law, previously considered to be established by the well-known case of *Wright v. Wakeford*, can be considered in force. It seems to us that it was by the decision of *Doe v. Spilsbury* overruled. If that be so, it is quite clear this power was well executed. But we are embarrassed by certain *dicta* of the noble lords by whom the decision of *Doe v. Spilsbury* was pronounced, in which they say they do not mean to overrule *Wright v. Wakeford*, but to leave its authority untouched, and confine their decision to the case where the attestation is general, and omit altogether all mention of formalities required by the power to be attested. But even if this case be so, we still think this power was well executed. It is conceded that the attestation need not follow the words of the power literally; for when the power given is to be exercised by signing and

publishing a will, by having an attestation of both those formalities, it would clearly be well executed if the attestation expressed that it was signed and delivered; and this was expressly so determined by the court in a case of *Ward v. Swift*, 1 Cr. & M. 171, and by the Vice Chancellor Shadwell in *Simeon v. Simeon*, 4 Sim. 555. Now, what is the principle which governs those decisions? We think it is this, that if the attestation expresses, in any form of words, an act to have been done in the presence of witnesses, by which the complete execution of the instrument, as required by the power, appears to have been effected, it would be sufficient; but that when the framer of the power requires two or more such acts to be done, then if the attestation expresses only the doing of one of them, even though all persons would clearly infer the other act had also taken place, it would not be sufficient; for in this latter case it is clear the framer of the power really intends something more than the act expressed in the attestation, because he has expressly added the other act. Thus, in this case, he requires both signing and publishing. The signing, therefore, in the presence of witnesses, though it might naturally and reasonably be also called a publishing, will not alone do, for he expressly says, the will is to be signed in the presence of witnesses, and also published. But here it is both signed and sealed in their presence. Now, if sealing in the presence of witnesses be naturally and reasonably to be considered as a publication — and we think it may be so considered — then we have enough in this attestation to fulfil the whole power; for it is signed in the presence of two witnesses, and it is published also, if being sealed in the presence of witnesses amounts to a publication, as both these acts are stated here in the attestation. We therefore think, for these reasons, that this power was well executed, and shall certify accordingly."

March 27, 1851. The certificate of the barons of the Court of Exchequer having been returned to the Court of Chancery, the cause came on to be finally disposed of by this branch of the court, the same having been transferred to his honor's paper.

Roundell Palmer and *Hislop Clarke* asked for the confirmation of the exchequer certificate, and for the costs of the suit.

Malins and *Dickinson*, for the plaintiff, contended, that, as shown by the reasons given by Mr. Baron Alderson, the law was in an uncertain state with reference to the case of *Wright v. Wakeford*; and as this suit was instituted before the decision of *Doe v. Spilsbury*, no costs ought to be given against the plaintiff, but, on the contrary, the costs ought to come out of the fund in court.

KNIGHT BRUCE, V. C. I am not aware of any reason or authority for saying that the author of this power meant that there should be a declaration to the witnesses by Mrs. Ireland of the publication of her will, nor do I understand what publication means. "Republication" is a term well known and understood. A will is published when it is

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made. The word "publish" is useless, or superfluous, or of no meaning. I confirm the certificate. Let the bill be dismissed, without costs up to and inclusive of the certificate of the Court of Common Pleas, and with costs after that time, including the costs of the certificate of the Court of Exchequer. Let the fund be transferred to the legal personal representatives of Mrs. Ireland.

During the several arguments the following cases were cited: *Allen v. Bradshaw*, 1 Curt. 110. *Bartholomew v. Harris*, 15 Sim. 78. *Brooke v. Mitchell*, 6 M. & W. 473. *Curteis v. Kenrick*, 3 M. & W. 461, 9 Sim. 443. *Doe v. Peach*, 2 Mau. & S. 576. *Doe v. Pearce*, 6 Taunt. 402. *Doe v. Spilsbury*, 10 Cl. & Fin. 340. *George v. Riley*, 2 Curt. 1. *Miller v. Ross*, 2 Hag. Eccl. Rep. 207. *Moodie v. Reid*, 1 Mad. 516, 7 Taunt. 355. *M^{rs} Queen v. Farquhar*, 11 Ves. 467. *Mackinley v. Sison*, 8 Sim. 561. *Stanhope v. Keir*, 2 Sim. & S. 37. *Simeon v. Simeon*, 4 Sim. 555. *Lempriere v. Valpy*, 5 Sim. 108, Shep. Touch. 411. *Warren v. Postlethwaite*, 2 Coll. 115. *Ward v. Swift*, 1 Cro. & M. 171. *Wright v. Wakeford*, 17 Ves. 454, 4 Taunt. 213. *Waterman v. Smith*, 9 Sim. 629; and other cases.

HOLT'S CASE; *in re* THE INDEPENDENT ASSURANCE COMPANY.¹

April 25, 1851.

Contributory — Trustee — Deed.

The directors having improperly given shares to the managing director, he induced his brother to execute the deed in his name for part of these shares. The directors subsequently recalled these shares:—

Held, that the brother was a contributory.

THIS was an application that the name of Robert Holt might be included in the list of contributories to the Independent Assurance Company. This company was completely registered on the 29th of October, 1849. The deed registered was dated the 24th of August, 1848, and was between the several persons whose names were thereto affixed of the first part, three other persons of the second part, and William Holt of the third part. It recited the formation of the company, the capital of which was to consist of 100,000*l.*, in 8000 shares of 12*l.* 10*s.* each, on which an instalment of 1*l.* 10*s.* was to be paid; and that the provisional directors, one of whom was William Holt, had made an allotment of shares, and had retained to themselves, and, upon the application of the several other parties thereto, had appointed to them, the shares in the company set opposite to the names of themselves, the said directors, and such other parties respectively, in the first schedule thereto annexed; and that such other parties respec-

¹ 15 Jur. 369.

Holt's Case; in re The Independent Assurance Company.

tively had paid the deposit of 1s. 3d. on the amount of the shares respectively subscribed for by them. It contained covenants by all the other parties, with William Holt as trustee, that the persons executing the deed, and the several other persons who should become shareholders as thereafter mentioned, should, while holding shares in the capital of the said company, be and continue, until the said company should be dissolved under the provisions thereafter contained, a company, in manner therein mentioned; that each such shareholder would, when required, pay up the amount of the instalments payable on the shares taken by such shareholders respectively, and would perform the several engagements therein contained on the part of the shareholders. In the subsequent part of the deed were contained the usual provisions for the transfer of shares, and for their forfeiture under certain circumstances. At a meeting of the provisional directors held on the 7th of September, 1848, it was resolved, that, in consideration of his services, the board assign 300 shares to Mr. William Holt, the managing director, the value of them when issued to be deducted from his allowance, the amount of which should thereafter be determined. Only 100 certificates were, however, issued to William Holt on these shares. It appeared from the evidence of William Holt, and was not disputed at the bar, that as William Holt was the covenantee in the deed of settlement, and could not, therefore, covenant with himself, he induced his brother, Robert Holt, to sign the deed in his name as holder of 150 shares, but, in fact, as trustee for him. Robert Holt's signature was dated in September, 1848, and several shareholders appeared to have executed the deed afterwards. At a meeting held on the 28th of December, the resolution as to the shares given to William Holt was rescinded, the directors thinking that the salaries ought not to be paid in shares. At another meeting, held on the 1st of February, 1839, it was resolved, that, certificates for 100 shares having been delivered to the managing director, in conformity with the resolution of the 7th of September, 1848, and such resolution having been rescinded, Mr. Holt be requested to give a certificate stating that he is himself responsible for them. Mr. Holt accordingly gave such certificate, and afterwards returned all the 100 share certificates to the directors. The master had not made Robert Holt a contributory, and this motion was, therefore, made by way of appeal.

Bethell and *Roxburgh*, in support of the application, cited *Davidson's Case*, before Knight Bruce, V. C.

Cairns opposed. We contend that Robert Holt is no longer a shareholder, if he ever was. The covenant in the deed applies merely to such time as the shareholder holds shares; but if by any means he loses his shares, he is discharged. It is not absolutely necessary that the shares should be regularly transferred — there are other means, such as forfeiture. Here the directors had done what they had no right to do, and then rescinded their proceedings. It was a mutual error, and the court will place the parties in the same position as if it

Smallwood v. Rutter.

had not been made. One hundred of the shares only have been issued to William Holt, and the whole thing was incomplete.

[*Lord Cranworth*, V. C. But several shareholders executed the deed after Robert Holt, and therefore may be said to have executed it on the faith that he was then a shareholder.]

To them we say, we only agreed to be bound so long as we held shares. Those who executed after us could not know that we had not regularly given up our shares before they executed the deed. *Davidson's Case* was one of undoubted fraud. In this case, Robert Holt only represents William Holt, who is, in fact, the shareholder.

LORD CRANWORTH, V. C. What were the reasons for Robert Holt executing this deed it is too late to speculate about. When he executes it, he enters into an agreement with other persons besides the directors. The deed begins by reciting the formation of the company, and that the shares had been allotted to the persons in the schedule, which includes the 150 allotted to Robert Holt. It then contains covenants that the several persons parties would pay up and contribute in proportion to their shares. It recites that the subscribers are holding shares, and therefore the parties covenant, that while they keep the character of shareholders they will perform their liabilities. When Robert Holt entered into that contract, he became liable to all the others. I do not believe that there was any fraud; the directors meant to do what was right, and then thought they had done wrong, and tried to undo it. They have, as between themselves and the company, removed all ground of complaint; but after all this has taken place, Robert Holt has executed a covenant, by which he impliedly enters into all the liabilities with all the parties to the deed. *Place the name of Robert Holt on the list of contributories.*

SMALLWOOD v. RUTTER.¹

April 23, 1851.

Infant — Next Friend — Motion to dismiss.

A bill having been filed at the suit of infants, *cestuis que trust*, by their next friend, charging breaches of trust, and praying the usual administration accounts against the trustees, a motion was made on behalf of the defendants that the bill might be dismissed, or for a reference to inquire whether it was for the benefit of the infants that the suit should be proceeded with; and if so, to inquire whether the next friend was a proper person to fill that character; and if not, to approve of another person to act as next friend. The grounds alleged as a foundation for the motion were, that the suit was set on foot from sinister motives by the father of the infants, who had become bankrupt, and was separated from his wife, the mother of the infants, to whose support he had ceased to contribute; that the next friend was a stranger to the matters at issue in the suit, and a mere nominee of the father; and that the proper form of proceeding (if any) was by claim, or request to the trustees to pay the trust fund into court under the Trustee Relief Act, and not by bill. The evidence for the motion failing to establish the existence of a sinister motive

¹ 15 Jur. 370.

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leading to the institution of the suit, or any imputation upon the character or solvency of the next friend, but merely showing that the circumstances under which he was named as next friend were open to suspicion, the court dismissed the motion, but without costs, observing, that the questions as to the propriety of the suit, and of the form of proceeding therein, might properly be dealt with at the hearing.

By the effect of the will and codicil of Ellen Elizabeth Mary Richards, deceased, her residuary estate stood limited to J. C. Rutter and W. Thomson, who were named as trustees and executors therein, upon trust, as to one moiety thereof, for the testatrix's daughter, Ellen Smallwood, for her separate use, without power of anticipation, for life, with remainder for the benefit of the children of Ellen Smallwood, in manner therein mentioned; and as to the other moiety thereof, upon trust for Emma Graham, the testatrix's other daughter, for life, for her separate use, without power of anticipation, with remainder upon trust for the benefit of the children of Emma Graham. The will contained a declaration that it should be lawful for J. C. Rutter, who was a solicitor, and his partner for the time being, and any future trustee of the will who should be an attorney or solicitor, to retain out of any moneys which might come to their or his hands, as trustees or trustee under the said will, the like professional costs, charges, and expenses for business to be done by them or him in their or his professional character, in or about the execution of the trusts of the will, and in prosecuting or defending any action or suit in relation thereto, as they or he would have been entitled to in case they or he had not been trustees or a trustee of such will. The bill was filed in January, 1851, by the five children of Ellen Smallwood, all infants, by H. J. Stevens, their next friend, against the two executors and trustees, the testatrix's daughter Ellen Smallwood and her husband, Edward Smallwood, and against her daughter Emma Graham and her husband, Peter Graham, and her children, as defendants. The bill charged that the defendants, the executors, had wilfully neglected to get in some parts of the testatrix's estate, whereby a loss had been occasioned thereto; that they had misapplied a great part of the personal estate received by them, and had not invested the same upon the trusts declared of the residuary estate in the will; that Thomson acted entirely under the control of Rutter; that Rutter had retained certain sums in payment of costs for business done in respect of the estate; that the sums so retained were too large. The bill prayed that the trusts of the will might be administered by the court, for the usual accounts of the trust estate as against the trustees and executors, and for a receiver.

The bill having been placed upon the file, the present motion was made on behalf of the defendants, except the defendants Edward Smallwood and Ellen his wife, that the bill might be dismissed, with costs, to be paid by the next friend personally, or for a reference to the master to inquire whether it was fit and proper, and for the benefit of the infant plaintiffs, that the suit should be further prosecuted; and if the master should find that it would be for the benefit of the infant plaintiffs that the suit should be further prosecuted, then that he might inquire and state whether the said Henry James Stevens was a proper

Smallwood v. Ratter.

person to be their next friend; and if he should be of opinion that the said Henry James Stevens was not a proper person, then that he might approve of some other person as the next friend of the infants, to have the conduct of the suit in place and stead of the said Henry James Stevens, and that all further proceedings in the suit might be stayed in the mean time. The affidavits in support of the motion, after denying the charges of neglect and of misapplication of the assets on the part of the trustees contained in the bill, stated, that the solicitor for the infant plaintiffs and their next friend was also the solicitor of Edward Smallwood, the husband of Ellen Smallwood, and father of the plaintiffs; that the bill was filed, without any prior application to the defendants for an account, at the suggestion of Edward Smallwood, for his private purposes, and not for the benefit of the infants; that Edward Smallwood married the testatrix's daughter against the wishes of her family; that Edward Smallwood had become bankrupt, and that he and his wife had for some time past lived separate and apart, the children being supported entirely by the exertions of their mother. It was also stated that the person suing as next friend of the infants was the nominee of the father; that he was an entire stranger to the family, and apparently without means. The affidavits in opposition to the motion stated that the suit was instituted at the instance of Edward Smallwood, under an apprehension that the trust fund would be misapplied by the trustees, and lost to the infants; that, in the instructions laid before counsel, Edward Smallwood had proposed himself as next friend for the infants, but that by the advice of counsel another person had been named as next friend, it being necessary that Edward Smallwood should be named as defendant in respect of his wife's interest in the estate. The affidavits of the defendants admitted the separation of Smallwood from his wife, and the fact of his bankruptcy, and stated that he had since obtained his certificate; they also went to show the respectability and solvency of the next friend.

Rolt and *Cole*, in support of the motion, contended that Stevens, a stranger to the matters in question in the suit, was the mere nominee of Edward Smallwood, and that Smallwood, by separating himself from his wife, and discontinuing his support of the children, had incapacitated himself from filing a bill as their next friend. The charges of neglect and misconduct on the part of the executors and trustees, contained in the bill, were without foundation. They had not been supported by any evidence on the part of the plaintiffs or their next friend. There was nothing in question in the suit which admitted of being wasted, and apart from the motives influencing the father of the infants, there was no object to be answered by the suit. The next friend ought to be acquainted personally with the merits of the case; but here he was an entire stranger to the matters in question in the cause, and acting solely at the instance of the father of the plaintiffs. The suit, in fact, was instituted, not for the benefit of the infants, but solely to promote the views of the defendant, Edward Smallwood. That being so, the court had clearly jurisdiction to

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dismiss the bill. *Nalder v. Hawkins*, 2 My. & K. 243. The suit was not merely to administer the estate, but was a hostile suit against the executors, and was calculated to occasion costs. The proper proceeding, if indeed any were necessary or justifiable under the circumstances, was the cheaper one by claim, or by an application to the trustees to pay the fund into court under the Trustee Relief Act. The bill ought to be dismissed. At all events, there were sufficient grounds of suspicion to justify a reference to the master in the terms of the notice of motion.

Bethell and *Kinglake*, for the plaintiffs, *contra*, said, that the father was the natural guardian of the infants, and as such was the proper party to protect their property. Counsel had been instructed in the first instance to draw the bill in the name of the father of the infants as next friend; but on it appearing that it would be necessary to name him as a defendant in respect of his wife's interest, a different next friend had, under advice, been substituted. The present motion was, in effect, an attempt to induce the court to supersede the parental control of the father over his children. The evidence for the motion failed to establish any sinister motive on the part of the father in instituting the suit, and, apart from such motive, the question of the wisdom of the proceeding could not be usefully entertained by the court. The trust extended over a considerable period, and there would be a continual temptation to the professional trustee to incur costs under the protection of the proviso in the will. The solicitor was the sole active trustee, the other, an elderly person, leaving the whole management of the fund to his co-trustee. Under these circumstances, the property could not be said to be entirely free from risk. The only way of protecting the property was by a suit in the form of the present. *Stevens v. Stevens*, 6 Mad. 97. The respectability of the next friend was beyond suspicion. Such suits had been always encouraged by the court, except in cases where it could be shown that the suit was instituted to answer an object different from the ostensible one. *Nalder v. Hawkins*, *ubi sup.* Here there could be no doubt of the *bona fides* of the proceeding. The motion, therefore, ought to be dismissed, with costs.

Rolt, in reply.

SIR GEORGE JAMES TURNER, V. C. This motion seems to me to call upon the court to exercise a very delicate and a very difficult jurisdiction. On the one hand we all regret the enormous expense incident to the prosecution of suits in this court; but on the other hand those who are best acquainted with the forms of the court know the protection thrown around the property of infants, by having it administered under the jurisdiction of the court. The court has to consider on the one hand the great benefit which the infants derive from the protection thrown around their property, and on the other hand to take care that expense is not thrown upon the infant's estate, either from malicious motives or from a motive of benefit to any

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parties who may be interested in the prosecution of suits. The primary question, therefore, in all these cases, seems to me to be, whether the suit is or is not instituted with any sinister motive; and the court must, I think, be extremely delicate in interfering in any case, in the short mode in which it is now called upon to interfere, unless it is perfectly satisfied that there has been some sinister motive leading to the institution of the suit. I think that the more strongly, because I apprehend that in all questions with reference to suits for the administration of estates, the question of costs is in the discretion of the court at the hearing of the cause; and if the court thinks the suit has been improperly or imprudently instituted, it may refuse to give costs out of the estate, and thus the infants will have the benefit of the protection of the court thrown around them without having to bear the expense of the suit.

Applying those principles to the present case, let us see what are the facts. It is undoubted here that the suit was instituted by the direction of the father of the infants. The father must be considered as having the legal guardianship of the infants. That cannot be denied. Having that guardianship vested in him, he has exercised his discretion in determining that it is for the benefit of these infants that the suit should be instituted, and their property secured under the direction of the court. This motion, in truth, calls upon the court to exercise its own discretion against the discretion of the father. Now, what has been the conduct of the father in this case? I pass by the observations which have been made, which seem to show a state of unfortunate embarrassment. He is separated from his wife, not apparently from any misconduct or imputation of misconduct, but in consequence of the difficulties he has been in. Being involved, he applied to a solicitor, by whom he is told, that the only mode in which the property can be protected is by the institution of a suit in this court. Now, it is said that this protection might have been given to the infants, either by filing a claim, or by the trustees being required to pay the fund into court under the Trustee Relief Act. It is quite true, that under the particular circumstances of the case, as they are suggested in the bill, either of those processes might have afforded adequate protection; but it is quite in the power of the court to judge of those questions at the hearing of the cause. If it should think at the hearing that a claim, instead of a bill, would have been effectual for the purpose, the court may, under the orders, if I recollect them rightly, prevent costs being allowed out of the estate beyond those which would have been incident to a claim. I say again, the court may consider whether the costs shall come out of the estate, with reference to the consideration that the trustees might have been applied to to bring the fund into court under the Trustee Relief Act. Now, has there been *bona fides* on the part of the father in the institution of this suit? One circumstance very much struck my mind, which has not been particularly commented upon, namely, that in the instructions laid before counsel for filing this bill, those instructions were, that the father should be named as next friend. It is impossible to say he did not intend *bona fide* to

In re The Joint-stock Companies Winding-up Acts, &c., ex parte Williams.

act for the benefit of the infants in the institution of the suit, when he himself was to be named as next friend, subject to all the liabilities and consequences to arise out of the institution of the suit. I think, therefore, so far as relates to general principle, there is no ground on which I can dismiss the bill, or refer it to the master to inquire whether the suit is for the benefit of the infants. It has been said the bill contains a variety of allegations against the trustees, of breaches of trust, of wilful default, and allegations on the subject of costs incurred, having regard to the particular clause introduced into the will for the indemnity of trustees. It is a sufficient answer to this, that all the allegations will be to be dealt with by the court at the hearing. It will be quite in the power of the court to dismiss the bill with costs, so far as these charges are concerned, at the hearing, in case these charges are not established as matter of fact. So far as to the first object of the motion. With regard to the next object of the notice of motion, as to the removal of the next friend: after considering the affidavits very carefully, and all the statements on the subject of the next friend, I do not find any imputation cast on his solvency or his character; the circumstances under which he was named as next friend are open to some degree of suspicion, but I do not think there is any substantial case made either against his character or against his conduct. Therefore, on that ground, I think the motion cannot be supported, and that I am justified in refusing it, but without costs.

*In re THE JOINT-STOCK COMPANIES WINDING-UP ACTS, AND OF THE BOSTON, NEWARK, AND SHEFFIELD RAILWAY COMPANY, ex parte WILLIAMS.*¹

November 16 and 18, 1850.

Joint-stock Companies Winding-up Acts.

A provisionally registered railway company having abandoned their undertaking, the directors made two payments to the shareholders in part return of their deposits; and they offered to make a third and final payment, which the whole or nearly the whole of the shareholders, except A, accepted. All the debts and liabilities of the company were discharged, and all the assets of it were exhausted; and A applied for and received the second payment, as being one of the shareholders who had concurred in the dissolution of the company. Nevertheless, he, being dissatisfied, as he alleged, with the directors' accounts, petitioned for an order for the dissolution and winding up of the company, or for winding it up if it had been already dissolved.

The court refused to make the order at once, and directed the master to inquire and state whether it was necessary or expedient that the company should be dissolved and wound up, or wound up.

THE above-mentioned company was provisionally registered in August, 1845. The capital of it was to be 1,600,000*l.* in 64,000 shares of 25*l.* each; and the deposit was to be 2*l.* 12*s.* 6*d.* per share.

¹ 1 Sim. (n. s.) 57.

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The petitioner took one hundred shares in the scrip of the company, and paid the deposits on them; and he executed the parliamentary contract and the subscribers' agreement, as did the other allottees of shares. But the company having failed in their attempts to obtain an act of Parliament for making their railway, owing to the standing orders not having been complied with on their behalf, they abandoned their project; and the directors paid to the petitioner and other shareholders, first 1*l.*, and afterwards 10*s.* per share, in part return of their deposits.

The latter payment was made out of stock of the Midland Counties Railway Company, a competing company, which the Boston, Newark, and Sheffield Railway Company had received in consideration of the abandonment of part of their line. Before that stock was distributed, the secretary of the company sent a circular letter to the petitioner and other shareholders, which was, partly, as follows: "*Scripholders who concur in the dissolution of the undertaking*, and wish to receive the Midland stock, are requested to send to the secretary for forms of application; which they are requested to fill up, sign and forward, with their scrip certificates, to No. 1 Little George Street, Westminster, on or before the 29th of September, 1846. After that date, these offices will be finally closed, and all subsequent communications on this and every other business of the company must be addressed to Mansfield, Notts. The scrip certificates will be returned to the holders, after they have been marked and recorded, and the Midland stock will be issued as soon as it can be got ready." On the 15th of November, 1848, the chairman of the company sent the petitioner a statement of the accounts of the company, together with a form of application for the final return of 1*s.* 6*d.* per share; and a letter requesting the petitioner to return the form properly filled up, with his scrip certificates, and adding that, in exchange for them, a check would be sent to him for the amount of the return. But the petitioner being, as the petition alleged, dissatisfied with the accounts, and more especially in reference to the gross and exorbitant items for solicitors, parliamentary expenses, engineering and surveying, and the application of 13,528*l.* for the purchase of one hundred and fifty shares in the Mansfield and Pinxton Railway, (with which the company had no concern,) and the loss occasioned by the holding of eighty-six 50*l.* Midland shares, and other departures and improper payments by the directors, refused to accept the final dividend. The petition further alleged that the petitioner believed that there were liabilities of the company for which the members of it were or might be liable; that the company had ceased to carry on any business, and the project had been entirely abandoned; and the secretary and clerks discharged, but the affairs of it had not been wound up; that the petitioner believed that there was, in the possession of the directors, a large amount of money arising from the deposits paid by the contributories, and which was available for distribution amongst them, and that the sums arising from deposits had been misapplied; that the petitioner was one of the contributories, and that he and the other contributories were desirous that the affairs of the company should be

wound up, and that the court should declare that the company was or ought to be dissolved. The petition prayed for an order for the dissolution and winding up of the company, or, if it should have been already dissolved, for the winding of it up.

The late chairman of the company made an affidavit in opposition to the petition, stating that the allegation in the petition, as to the gross and exorbitant items for solicitors, parliamentary expenses, engineering and surveying was not true, inasmuch as the bills of the engineers, solicitors and surveyors were very heavily mulcted, and as great deductions made therefrom as the directors were advised would be safe and prudent; that one of the clauses in the agreement entered into by the shareholders with the company on the 14th of October, 1845, expressly empowered the provisional directors to purchase, out of the deposits, all or any of the shares in the Mansfield and Pinxton Railway, at such prices as they should be able; *that there were no liabilities existing against the company or any member thereof, in respect of any debt due or alleged to be due by the company; that not a shilling of the assets of the company was left, and none of the directors had any money belonging to the company in their hands, nor was any standing to the credit of the company, at its late bankers; that previous to the distribution of the Midland stock, a circular was drawn up by the said railway, and forwarded to all the shareholders thereof, requesting them to send to the secretary of the railway for forms of application, as shown in the petition; and that the petitioner, in conjunction with 63,449 out of the whole 64,000 shareholders, sent in his application concurring in the dissolution of the company; that the holders of 56,271 shares had received the 1l. 10s. per share, and the final dividend of 1s. 6d. per share in discharge of their deposits, and had consented to the winding up of the undertaking; and the deponent believed that by far the majority of the remaining outstanding shares were lost or destroyed.*

Mr. Bethell and Mr. Wright, (Mr. Terrell was with them.) in support of the petition, said that the petitioner was one of the contributories, and that, as such, he was entitled to the usual order for winding up the affairs of the company.

Mr. Selwyn, (Mr. Rolt was with him,) for the late chairman of the company, submitted that there was no ground for putting the contributories to the expense which would be incurred by winding up the affairs of the company; and that, before the matters complained of by the petition would be investigated, the master would have to settle a long list of contributories, not one of whom, except the petitioner, sought to disturb the existing arrangement; and he cited *Ex parte Pocock*, 1 De Gex & Smale, 731; *Ex parte Murrell*, 3 De Gex & Smale, 4, and a case recently decided by Vice Chancellor Knight Bruce, *In the matter of the London, Newbury and Bath Railway Company*, Law Times, Nov. 16, 1850. He added that the petitioner might bring an action or file a bill against the directors, if he thought fit so to do; that, with the exception of the small sum of

In re The Narborough and Watlington Railway Company, ex parte James.

112l. 10s., the whole amount of his deposits had been returned to him; that no assets of the company remained to be got in; and that no one was suing or could sue the petitioner as a member of the company, for all the debts and liabilities of the company had been discharged.

Mr. Bethell, in his reply, said that, in *Ex parte Pocock*, a very large majority of the shareholders had released the directors.

The VICE CHANCELLOR, after having perused the affidavits in support of and in opposition to the petition, said that there were three courses for the court to adopt: either to dismiss the petition; to make an order according to the prayer of it; or to direct a preliminary inquiry to be made by the master, as the late vice chancellor of England had done; that he thought that, under the circumstance of this case, the last course ought to be adopted; and, therefore, he should direct the master to inquire and state whether it was necessary or expedient that the company should be dissolved and wound up, or be wound up; and that he should reserve the question of costs, and give liberty to apply.¹

*In re THE NARBOROUGH AND WATLINGTON RAILWAY COMPANY,
ex parte JAMES.*²

December 18, 1850.

Joint-stock Companies Winding-up Acts — Costs.

A petition praying either that a company might be wound up, or that a preliminary inquiry might be directed as to the expediency of winding it up, was dismissed, as having been presented without sufficient ground; and the petitioner was ordered to pay the respondent's costs, although the respondent was not liable as a contributory, nor had been served with the petition, but appeared voluntarily.

THE petition stated that, in September, 1845, an association, joint-stock company or partnership was projected and provisionally registered under the title of the Wolverhampton, Walsall, Leicester, Peterborough, Norwich, and Yarmouth Junction Railway Company; and thereupon an association or joint-stock company was formed for the purpose of obtaining, by act of Parliament, power to make the railway; that a very great number of shares in the undertaking was applied for by the public; that the petitioner was one of the

¹ The above petition had been heard by the late vice chancellor of England, who made a similar order upon it on the 26th of March, 1850. Two days afterwards, the registrar's office was closed for the Easter vacation, and was not reopened until the 8th of April. On the 13th of that month, the petitioner left his brief in the office, for the purpose of the order being drawn up; but it was then too late for him to advertise the order, as the 15th section of the Winding-up Act of 1848 requires, in the London Gazette, within twelve days after the date of it, and for that reason he procured the petition to be reheard.

² 1 Sim. (n. s.) 140.

In re The Narborough and Watlington Railway Company, ex parte James.

provisional directors of the company, and, as such, a member or contributory thereof; that in November, 1845, the committee of management of the intended company, of which the petitioner was a member, determined to confine their operations to a certain portion of the line; that considerable expense was incurred in the formation of the said company and otherwise in relation thereto and the said projected undertaking, before the registration of the company next after mentioned, and also in endeavoring to wind up the affairs of the said company;¹ that in November, 1845, the project for making such portion of the last-mentioned railway as aforesaid was provisionally registered under a title mentioned in the petition, and in January, 1846, under the altered title of the Narborough and Watlington Railway Company; that none of the allottees paid the deposits on the shares allotted to them, and therefore the standing orders of Parliament could not be complied with; and, thereupon, it became impossible for the company to take the necessary steps towards applying to Parliament for an act to authorize their undertaking, and, in consequence thereof, the company had become wholly abortive, and the undertaking had been abandoned, and the company had ceased to carry on any business whatever; that expenses to a considerable amount had been incurred in and about the matters aforesaid, and various sums of money had been contributed, by the petitioner and various other members of the company, towards the discharge of the debts and liabilities thereof, but the amount so contributed was wholly insufficient to discharge such debts and liabilities; *and that there were many outstanding debts and liabilities of the company, to a considerable amount, in respect of which the petitioner, or any other contributory, was liable to be sued by the creditors of the company.* The petition prayed that the company might be absolutely dissolved and wound up, and for a reference to the master to wind it up, or to make preliminary inquiries as to the propriety, necessity, or expediency of dissolving it and winding it up.

The Hon. Henry William Wilson made an affidavit, in opposition to the petition, by which he deposed that, in the year 1845, he was induced by Joseph Green James, a solicitor residing at Walsall, to allow his name to be placed upon the provisional committee of the railway company; that the scheme became abortive and was abandoned, and he had to pay various sums of money in liquidation of claims made against him in respect of the intended railway; that a committee was appointed to investigate the affairs of the company, and to discharge such liabilities as might be found justly due; that, in common with some other members of the provisional committee, he paid 76*l.* 10*s.*, as his share, towards the liquidation of such expenses, and he believed that the amount so received by the committee was properly applied in discharging the liabilities of the company; *that this took place so far back as the year 1846, since which time he had had no claims whatever made upon him in respect of the railway, save by Joseph Green James himself, who brought an action against him*

¹ The above statement of the petition was correctly taken from the brief.

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for the recovery of his bill of costs, amounting to 2106*l.* 4*s.* 1*d.*, put him to great expense in preparing to oppose the same, and, on the trial of the cause, without any previous intimation whatever, abandoned his claim for his bill of costs, and confined his demand to the sum of 616*l.*, as a payment made to the engineer of the company; that the deponent obtained a verdict against Joseph Green James, but the taxed costs of the action were not yet paid, owing to the alleged poverty of Joseph Green James; that, in addition to the taxed costs, the deponent had incurred heavy expenses through the conduct of Joseph Green James, and he considered that the petition was but another scheme for extorting more money from him and others; *that the petitioner was brother to Joseph Green James; that the deponent was not aware that there was a single bona fide claim outstanding against the company*, the committee appointed to investigate the affairs of the company having invited all persons having claims to send them in, and all claims so sent in having been fully discharged by the committee; and the deponent believed that there was no reason whatever for winding up the affairs of the company under the provisions of the Winding-up Acts, save as affording Joseph Green James another opportunity of attempting to recover his bill, or, in default, of putting money into his pocket, in the shape of expenses, for winding up a company wound up and settled nearly four years ago.

Other affidavits were made in opposition to the petition, from which it appeared that Joseph Green James was not only the brother, *but also the solicitor of the petitioner*, in the petition; that, in August, 1849, he wrote two letters to Mr. Wilson's solicitor, stating that a petition had been drawn and would be presented on the first petition day, for winding up the affairs of the company, and that he was informed that he should be able to obtain the whole amount paid by him to engineers and others, from the allottees; and that the Winding-up Act would bring all to book. It further appeared from the affidavits, that, in October, 1845, Joseph Green James signed and distributed a printed paper, by which he, as solicitor to the railway, undertook and declared that he would not call upon, require or expect any promoter, provisional or permanent director, or member of the provisional committee, or then or future shareholder of the railway, to be or become, personally or individually, liable or chargeable for any salary, cost, charge, matter or thing whatever that might be or had been done by him or by his direction; and that he would look solely and entirely to the funds of the company and to the shares which should be subscribed for or contracted to be purchased, for payment of any salary, cost, charge or account duly incurred by him for the purposes of the company.

The petitioner stated, in an affidavit in reply, that he believed that there were outstanding liabilities against the company to the amount of 1000*l.* and upwards, and amongst them 78*l.* due to the parliamentary agent to the company; 20*l.* due to certain printers for printing prospectuses for the company; and divers sums, amounting in the whole to 70*l.* and upwards, for advertising and goods sold and delivered to the company. Another affidavit in reply was made by Joseph Green

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James, stating that he had examined the books of the company, and that he did not find that Mr. Wilson ever applied for, or had any shares in the company allotted to him.

The petition now came on to be heard.

Mr. Rolt and *Mr. W. Morris*, in support of it, said, that an amount of liabilities outstanding against the company was sworn to, and that the petitioner was liable to be sued in respect of some of them, and, therefore, he was entitled to the usual order for winding up the affairs of the company. And they objected to Mr. Wilson being heard in opposition to the petition, because he was not a contributory to the company, nor had he been served with the petition, but appeared upon it, in consequence of its having been advertised in the London Gazette, pursuant to the 10th section of the Winding-up Act of 1848, 11 & 12 Vict. c. 45. They cited *Roberts's Case*, 2 Hall & Twells, 391; and 2 Macn. & Gord. 192. *Besley's Case*, 2 Hall & Twells, 375; and 2 Macn. & Gord. 176. *Ex parte Cooke*, 3 De Gex & Smale, 148. *Ex parte Holinsworth*, Ibid. 7.

Mr. Malins and *Mr. De Gex*, for Mr. Wilson, said, that the petition was, in fact, the petition of Joseph Green James, and the object of it was to obtain from the members of the company the payment of certain debts for which he was liable, and against which he had indemnified them by his guaranty; that the petitioner did not allege that any action or suit had been commenced, or was intended to be commenced against him; and, indeed, that no liabilities whatever existed against the company; but all the just demands against it had been liquidated by the payments made by Mr. Wilson and others; that those payments were made for the sake of peace, and were not an admission of liability on their parts; that, in the present uncertain state of the law on the subject, Mr. Wilson might be held to be a contributory in the master's office; and, therefore, he was entitled to appear and oppose the petition. *Ex parte Pocock*, 1 De Gex & Smale, 731. *Ex parte Murrell*, 3 De Gex & Smale, 4.

Mr. Morris, in reply, said, that there might be demands against the company, to which the guaranty did not extend, and that there might be persons liable to the demands to which it did extend.

The VICE CHANCELLOR. I think that this is a case in which I ought not to make any order.

If the matter were *res integra* and I were not bound by any authority, I should not, as at present advised, make any order in any case where a body of persons have associated themselves together to form a company which ultimately turns out to be abortive; and, speaking with all due deference, I think the extent of evil which orders in such cases have produced, has not yet been fully considered. What is here called a company, is the body of promoters of the company. The transactions of such a body of persons are not entire as in the case of a partnership, but rather a series of transactions affecting only

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the parties severally acting therein, and for which the members of the body are, so to say, liable piecemeal. It does not follow, because a number of persons associate to form a company, that all of them are liable to contribute; the very contrary has been decided in a court of law. The members of such a body are not partners, nor are they agents for each other, with respect to all matters properly done for the formation of the company. Each, in law, is liable for those acts which he has expressly or impliedly authorized. Therefore, it may be that A, B, and C are liable to the engineer; D, E, and F to the parliamentary agent; G and H to the advertising agent, and so on. The difficulties will be endless in doing justice to all parties, when you come to make the necessary calls to liquidate the debts in those cases in which orders of reference have been made. It is, however, now too late to contend that these associations for the formation of a company are not within the terms of the Winding-up Acts. But, though they have been decided to be within the principle of the Winding-up Acts, yet, I must say, when a case is presented which you are asked to bring within the operation of the acts, it is a matter of discretion to pronounce the order of reference or not; and where that discretion is to be exercised, the inconvenience to arise out of such a reference is a circumstance not to be disregarded. I do not set up my judgment against the decisions which have been already pronounced. I concur entirely in the observations that have been made by Vice Chancellor Knight Bruce, on whose experience I am most happy to rely, that orders heretofore have been, perhaps, too hastily made, and that the court is bound to see whether it is expedient that such orders should be granted before they are made.

Now, looking at the circumstances of this case with this feeling in my mind, I cannot help seeing that it is one in which the order ought not to be made. If I were to make the order, it would lead to great expense and litigation, and no man can tell where it would end.

What is this case? The petitioner is clearly acting to favor his brother, the solicitor to the company. On the formation of the scheme, the solicitor said, "Gentlemen, form yourselves into a provisional committee, and I will not hold you personally liable for my costs and expenses, but I will look to the funds to arise from subscriptions." Relying on that undertaking, parties came forward and concurred in acts which, but for that indemnity, they would not have concurred in. All that the petitioner has shown as a foundation for the petition is, that he was formerly on the provisional committee. That, however, as Mr. Malins contended, is not sufficient to make him liable as a contributory, and it does not appear from the petition that he acted in other respects so as to make himself liable for any thing. It is very true that, two or three months after the scheme had proved abortive, the respondent and others, who termed themselves members of the committee, went to a meeting and subscribed a certain sum per head, *causa pacis*, being told that there their liability would end. But I am of opinion that that act cannot be held in a court of justice to amount to an admission of liability by those

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parties. All that can be inferred from it is, that the parties imagined at the time that they were open to attack by suit, and that it was better to pay down a certain sum than to be kept in trouble. The allegation, too, is that all this happened some four or five years since. The petitioner says that the liabilities of the association amount to 1000*l*. This, however, is made out only to the extent of 168*l*., exclusive of his brother's costs and expenses; and in this 168*l*. are included certain items of charge in respect of parliamentary agency and advertising, which are, in effect, costs incurred by the solicitor who employed the parties, and are costs covered by the guaranty. The solicitor, after having failed in an action for his costs, threatened, in August, 1849, to bring the whole matter into the master's office; and now this petition is presented by his brother, upon a loose allegation of liability to outstanding debts. Under all the circumstances of the case, the petition appears to me to be without foundation; and it must, therefore, be dismissed, with costs.

Mr. Morris. As the respondent has not been served with the petition, but has appeared voluntarily, and as he cannot be held to be a contributory because he was only a provisional committee-man, he has no right to appear, or, at all events, ought not to have his costs; and Vice Chancellor Knight Bruce has never given costs in a similar case.

Mr. De Gez. In the present uncertain state of the authorities, the respondent might have been placed on the list of contributories, which would have occasioned him both trouble and expense, and therefore he was quite justified in appearing and opposing the petition, although he has not been served with it.

THE VICE CHANCELLOR. If Vice Chancellor Knight Bruce is not in the habit of giving costs, in a case like the present, I cannot go along with him.

In an administration suit, where the language of the will is ambiguous, the costs of the suit are always ordered to be paid out of the estate, because the costs were occasioned by the testator. Here, who occasioned the costs? Why, the petitioner; and as I am of opinion that the petition was presented without sufficient ground, I think that he must pay the costs of having placed himself in a situation in which he does not succeed.

Petition dismissed, with costs.

In re Coyte's Estate, and in re the Liverpool Dock Acts.

***In re COYTE'S ESTATE, AND in re THE LIVERPOOL DOCK ACTS.*¹**

January 25, 1851.

Liverpool Dock Acts — Lands Clauses Consolidation Act — Reinvestment of Compensation Money.

Money paid into court by the Liverpool Dock Trustees, in respect of leaseholds for years, taken by them under the powers of their act of Parliament, ordered to be reinvested in the purchase of copyholds of inheritance.

By the will of William Coyte, dated the 5th of September, 1831, certain houses in Liverpool, being leaseholds for years, were devised to his daughter, Julia, for her separate use, for life, and after her decease, to her issue living at her death as purchasers; but if she left no issue living at her decease, then to the testator's son, William.

The testator died in 1832. William, his son, died in 1833, intestate. Julia, after the testator's death, intermarried with H. Walker, and had issue two children, who were infants at the time of making the order after mentioned. In June, 1849, the trustees of the Liverpool docks, in exercise of the powers contained in the Liverpool Dock Acts, took the said houses, and paid 630*l.*, the amount of the purchase money and compensation, into court. A petition was thereupon presented by Julia Walker and her husband for the reinvestment of the 630*l.* in copyholds of inheritance. On this petition the court made the usual reference to the master.

Master Tynney, by his report, certified, amongst other things, as follows: "Having regard to the fact that the land and premises sold to the trustees of the Liverpool Dock Company were leasehold, and that the land and premises, proposed now to be purchased with the money arising from such sale, are copyhold of inheritance, I humbly submit to the judgment of this honorable court, whether the same is a proper investment." The master also reported that it would be for the benefit of all parties interested that the 630*l.* should be invested in the copyholds.

The petition of Julia Walker and her husband to confirm the report, and for consequential directions, now came on for hearing.

Mr. J. Nicholson, for the petitioners, referred to the Liverpool Dock Act, 7 & 8 Vict. c. 80, s. 22,² which, he argued, gave the court juris-

¹ 1 Sim. (n. s.) 202. *Ex relatione* Mr. J. Nicholson.

² The 22d section of the Liverpool Dock Act, 7 & 8 Vict. c. 80, is, substantially, the same as the 74th section of the Lands Clauses Consolidation Act, and is as follows: "That, where any purchase money or compensation paid into the Court of Chancery, under the provisions of this Act, shall have been paid in respect of any lease for lives or years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the Court of Chancery, on the petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said court may consider will give, to the parties interested in such money, the same benefit therefrom as they might have legally had from the lease, estate, or reversion in respect of which such moneys shall have been paid, or as near thereto as may be."

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diction to order such a reinvestment as would give the parties interested the same benefit, though not necessarily the same estate, as they had in the land taken by the company. The master had found that the proposed investment was for the benefit of all parties interested.

Mr. Hare, for the administrator of William Coyte, the son; and

Mr. Bourdillon, for the Dock trustees, consented to the application.

The VICE CHANCELLOR at first doubted whether he could sanction such an investment, and asked by what form of order it was proposed to effect the object of the petitioners. The minutes, as stated below, so far as they are special, having been read to the court, his lordship thought that, under all the circumstances of the case, he might venture to make the order according to the proposed minutes.

Declare that the copyhold hereditaments in the petition mentioned are a proper purchase wherein to invest the 630*l.* cash, subject to the directions hereinafter given. Refer it to the said master, to approve of a proper conveyance and surrender of the said copyhold hereditaments to two trustees, their heirs and assigns, upon trust, for the petitioner, Julia Walker, during her life, subject to such terms and conditions as by the will of W. Coyte, the testator, are expressed and declared, of and concerning the leasehold houses in the said will mentioned; and from and after the decease of the said Julia Walker, upon trust, to sell the said copyhold hereditaments, and to stand possessed of and interested in the moneys to arise from such sale, upon trust, for the person or persons who would, on the death of the said Julia Walker, be entitled, under the said will, to the said leasehold houses. Let the master approve of two proper persons, to be trustees, for the purposes aforesaid, of the said copyhold hereditaments; and order that such trustees declare the trusts thereof accordingly by deed, such deed to be settled and approved of by the master.

WEST v. JONES.¹

January 28 and 29, and February 19, 1851.

Mortgagor and Mortgagee.

In March, 1840, A, and B, a solicitor at Carmarthen, raised 2500*l.* by sale of a sum of stock of which they were trustees, with the intention of lending it on mortgage to C, who resided at Carmarthen, but spent part of the year in London. A enabled B to receive the 2500*l.* for the purpose of the loan, and intrusted him with the conduct of the transaction. Accordingly, B prepared the mortgage deed; and, on the 29th of May, 1840, through his London agents and by arrangement between him and C's solicitor procured C (who knew that the money was in B's hands) to execute it, and to sign a receipt on the back of it for the 2500*l.* The agents took the deed away with them, and, shortly afterwards, procured A to execute it, and then sent it to B. It having been arranged, between B and C,

¹ 1 Sim. (n. s.) 205.

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that the mortgage money should be paid into the Carmarthen bank, to C's credit, B, on the 31st of May, paid 513*l.*, and on the 31st of October, 1050*l.*, accordingly, in part of the 2500*l.* In November, he died insolvent:—

Held, that, as between A and C, A was to be treated as mortgagee for the whole 2500*l.*

This case was argued on the 28th and 29th of January, 1851, by

Mr. Bethell and *Mr. Lewin*, for the plaintiff; and

Mr. Rolt and *Mr. W. M. James*, for the defendants. The facts are stated shortly in the marginal note, and fully in the judgment, where the arguments also are stated and observed upon.

On the 19th of February, 1851, the VICE CHANCELLOR delivered the following judgment:—

The bill in this case seeks to establish against the defendants, who are the executors and devisees in trust of the late John Jones, of Ystrad, a mortgage security for 2500*l.*; and it prays a declaration that the plaintiff is entitled to be treated as a mortgagee to that amount, with further relief consequential on that state of things. The question in the cause is, whether the plaintiff is entitled to be treated as a creditor by mortgage for that amount, or only for a smaller sum of 1563*l.* 16*s.* 8*d.*

There is no doubt of the fact that, on the 27th of May, 1840, Jones executed certain indentures of lease and release, dated the 26th and 27th days of May, 1840, and that he thereby conveyed to the plaintiff and to Lewis Richard Vaughan, since deceased, and their heirs, certain freehold property, situate partly in the metropolis, partly in Cardiganshire, and partly in or close to the town of Carmarthen. The conveyance purports to be made in consideration of 2500*l.*, advanced to Jones by the plaintiff and Vaughan, and there is a proviso for redemption on repayment of that sum with interest. The day for payment is not stated, being left in blank. At the time of the execution, Jones also signed on the back of the deed a receipt for the whole 2500*l.* At the same time, by way of further security, Jones conveyed the equity of redemption of other large estates, then already in mortgage, to an insurance office for a sum of 30,000*l.*; but I do not think that any thing turns on that circumstance. In fact, that additional mortgage was of no value, the property having turned out to be insufficient to satisfy the prior mortgage. Vaughan, one of the mortgagees, died in November, 1840; and Jones, the mortgagor, died in November, 1842. After the death of Jones, various parts of the mortgaged property were sold by the defendants as devisees in trust of his property, and the purchase money was paid to the plaintiff, in part discharge of what was due to him. This was all done with his concurrence, and without prejudice to his rights as to the balance not satisfied by the produce of the sales. Under these circumstances, *prima facie*, the plaintiff is entitled to an account of what is due to him on the footing of his being a mortgagee for 2500*l.* That is the sum stated on the face of the deed, and by the receipt indorsed, as the sum advanced by the mortgagees.

But the case made by the defendants is that no such sum was really advanced; that the deed was prepared by the mortgagees, and executed by Jones, the mortgagor, upon a contract, by the mortgagees, that they would advance that sum, but that in fact they never did so; that in truth the only sums advanced were, first, a sum of 513*l.*, on the 30th of May, 1840, and, secondly, a sum of 1050*l.* 16*s.* 8*d.*, on the 31st of October following; and so the defendants say that the mortgage ought to stand as a security for those sums only.

It is clear on the evidence that Jones never, in fact, received more than those two sums; but the question is, whether he so conducted himself in the transaction as to entitle the plaintiff to say that, whatever may be the truth of the case, he is entitled to treat Jones as having received the whole 2500*l.* In order to establish his right so to do, the plaintiff relies on a principle perfectly familiar, not only to courts of equity but also to courts of law, namely, that where a party has, by words or by conduct, made a representation to another, leading him to believe in the existence of a particular fact or state of facts, and that other person has acted on the faith of such representation, then the party who made the representation shall not afterwards be heard to say that the facts were not as he represented them to be. This doctrine, it may be observed, is not confined to cases where the original representation was fraudulent. Where, indeed, that is the case, where a party makes a representation which he knows to be false, in order thereby to induce another to act on the belief that it is true, and that other party does so act, the whole transaction is, in the strictest and most obvious and popular sense of the word, a fraud. But the doctrine not only of this court, but also of courts of law, goes much farther. Even where a representation is made in the most entire good faith, if it be made in order to induce another to act upon it, or under circumstances in which the party making it may reasonably suppose it will be acted on, then, *prima facie*, the party making the representation is bound by it, as between himself and those whom he has thus misled.

These principles being clear, the question here is one of fact. Has the plaintiff made out that Jones said or did, or omitted to say or do any thing, the saying, doing, or omitting to say or to do which now precludes his representatives from insisting, as between them and the plaintiff, on the truth of the case, namely, that a part only of the 2500*l.* was ever advanced and lent to Jones? In order to arrive at a just conclusion on this point, we must, first, ascertain the material facts of the case relative to the advance of the money.

It appears that in the year 1839, the plaintiff and Lewis R. Vaughan were co-trustees of the marriage settlement of a deceased brother of Mr. Vaughan; and in that character they had standing in their names a sum of about 5000*l.* consols, the whole or a part of which they were willing to sell out, in order to lend the proceeds on mortgage. The plaintiff resided in London. Vaughan was a solicitor, living at Carmarthen. Mr. Jones resided at Ystrad, near Carmarthen; but I collect that, being a member of Parliament, he was generally resident in London during the session. His affairs, so far at all events as

relates to the matters in question in this suit, were managed by Mr. Gardner, a solicitor, at Carmarthen. Jones being indebted largely to the Carmarthen Bank, was anxious, towards the close of the year 1839, to borrow a sum of money on mortgage, in order to enable him to discharge his debt to the bank; and in this state of things a negotiation was opened between Vaughan and Gardner, acting for Jones, the result of which was that Vaughan eventually agreed to lend Jones 2500*l.*, to be secured by the mortgage now forming the subject of this suit. The money which Vaughan so agreed to lend was to be raised by sale of part of the trust funds so standing in the joint names of the plaintiff and himself. Gardner informed the Carmarthen Bank of this intended mortgage, and agreed that the money, when advanced, should be paid to Jones's account with them; and on the faith of that assurance, they made further advances to Jones, the particulars of which I do not think it necessary to state. The early part of the year 1840 seems to have been occupied by Vaughan in the investigation of the title, and preparing the mortgage deeds; but, on the 27th of March, 1840, Vaughan wrote to the plaintiff, to say that every thing was ready; and he asked the plaintiff to procure a power of attorney, for selling a sufficient part of the trust stock standing in their names, to raise the 2500*l.*, or, rather, 2600*l.*; but the additional 100*l.* had no reference to the mortgage, and need not now be adverted to. The necessary power was obtained and executed by the plaintiff and by Vaughan. The 2600*l.* was then raised by sale of part of the trust stock, and on the 15th of April, the proceeds, 2600*l.*, were, by authority of the plaintiff, remitted to the Carmarthen Bank to the sole credit of Vaughan, in order that he might apply 2500*l.*, part of it, on the proposed loan of Jones. The mortgage deeds having been prepared and engrossed by Vaughan, were by him transmitted to his London agents, Messrs. Walker and Grant, in order that they might procure the execution thereof by Jones, who was then in London, attending to his parliamentary duties, and also by the plaintiff. And, accordingly, on the 27th of May, a clerk of Walker and Grant took the deeds to Jones, who, in his presence, executed them, and at the same time signed the usual receipt for the 2500*l.*, though no money passed on the occasion. On the 29th of May, the same clerk took the deeds to the plaintiff, who executed them; and they were afterwards returned by Walker and Grant so executed to Vaughan, at Carmarthen. On the 30th of May, Vaughan paid into the Carmarthen Bank 513*l.*, on account of the mortgage money. It should be stated that, when Jones executed the deeds, there were blanks left as to the days of payment of the mortgage money, and Jones, on the day after his execution of the deeds, wrote to Gardner informing him that he had signed them, and desiring him to see that the blanks were properly filled up. I am satisfied on the evidence, as matter of fact, that, pursuant to those instructions, Gardner did, from time to time, apply to Vaughan to fill up the blanks, and to pay the balance of the money to the credit of Jones, at the bank. But such applications were attended with no result, until the 31st of October following, when Vaughan paid, to Jones's credit at the bank, a further sum

of 1050*l.* 16*s.* 8*d.* At the latter end of the following month of November, Vaughan died insolvent; and the question is, whether the plaintiff or the representatives of Jones are to bear the loss of the balance of the mortgage money, occasioned by that insolvency.

The plaintiff, in support of his equity, insisted, first, that Jones, or, which is the same thing, Gardner, certainly knew that the money was trust money, held, by the plaintiff and Vaughan, upon trust for somebody; and this is clearly made out by the evidence. There is, however, no question here between the trustees of the money or those who were dealing with them, on the one hand, and the *cestuis que trust* on the other. The lending of the money on mortgage was no breach of trust; and the knowledge that the money was trust money, does not seem to me to carry the case further than the knowledge that it was a fund held by the plaintiff and Vaughan jointly. In dealing as to the money with third persons, the plaintiff and Vaughan were merely joint owners and joint lenders. I do not think that the circumstance of their joint ownership being that of trustees affects the case.

The next fact which the plaintiff relies on is, that before May, 1840, and, therefore, some weeks at all events before the execution of the mortgage, Gardner knew that the 2500*l.* had been remitted to Vaughan. And this seems to me to be clearly made out. It may, therefore, be taken as established, that Vaughan, having agreed to lend, on mortgage, 2500*l.*, being money which he held as co-trustee with the plaintiff, receives, from the plaintiff, the whole of that money in order that it may be paid over to the borrower, and that this was known to the intended borrower. In this state of things, Vaughan, who must, I think, clearly be treated as the agent of the plaintiff in the matter of the loan and as being authorized to act for him, procures Jones, the borrower, to execute the deed, and to sign the usual receipt for the mortgage money, before, in fact, any part of it had been advanced. Of course, as between Jones and Vaughan, that execution and signature would avail nothing. Vaughan could never be allowed to say to Jones, "You have admitted the receipt of 2500*l.*, and I shall hold you to that admission." As between Jones and Vaughan, the execution of the deed, though the receipt of the whole mortgage money is admitted, was clearly an act done merely with a view prospectively to secure the 2500*l.* when it should have been advanced.

But the question is, What is its effect as between Jones and the plaintiff? And, in order to arrive at a just conclusion on this point, let us first consider how the case would have stood if Vaughan had been a mere agent for the plaintiff; that is to say, suppose the money had been wholly the money of the plaintiff, and that the plaintiff had employed Vaughan, his attorney at Carmarthen, to lend it on mortgage to Jones, and, for that purpose, had remitted it to Vaughan at Carmarthen, and that all this was known to Jones, the borrower. If, in such a state of things, Jones should have executed the mortgage and delivered it to Vaughan without receiving the money, he would, obviously, have put it in the power of Vaughan to cheat his em-

ployer by representing to him that he had paid the money over to Jones, when, in fact, he had not done so. The plaintiff would reasonably suppose, when he saw that the deed had been duly executed by Jones with a receipt for the money indorsed, that Vaughan, his agent, had performed his duty by paying over the money, and so obtaining the due execution of the deed. Jones, in such a case, knowing that Vaughan held the money merely as agent of the plaintiff, certainly ought not to have executed and parted with the deed without first receiving the money. Or, if he did so, he would, thereby, alter the relation of Vaughan towards the contracting parties. Vaughan would, thenceforth, hold the money as agent, not for the plaintiff, but for Jones.

The question then comes to this: How far is the case altered by the circumstance that Vaughan was not a mere agent for the plaintiff, but was a co-lender with him of the money? This is the part of the case on which I have had considerable doubt. But I have arrived at the conclusion that the same principles which would have prevailed if the plaintiff had been the sole owner of the money, are equally applicable to the actual facts of this case; namely, the loan of money belonging jointly to the plaintiff and to Vaughan. In the former case, the borrower, by executing and delivering the deed to the agent, says, impliedly, to the principal, that is to say, the lender, "I have received your money through the hands of your agent, and you need not trouble yourself further about it." In the latter case, he says, "Your co-trustee, in whose hands you placed the trust money in order that it might be lent to me, has lent it to me, and I have given him a mortgage by way of security to him and to you." But the material point, in both cases, is the same. The borrower, in the one case as in the other, enables the party actually trusted with the money to satisfy the party trusting him that it has been duly applied; and the principle of both courts of law and courts of equity in such cases is, that the party acting or abstaining to act on the faith of such a representation has a right, as between himself and the person by whom he has been so misled, to treat the representation as true.

It was argued, for the defendant, that, in this case, the money was in proper custody when it was in the hands of Vaughan; that it was, in fact, his money as much as the money of the plaintiff, and so that the doctrine applicable to the case of money in the hands of an agent could not be followed; that, here, the execution of the deed could not mislead the lender; for that Vaughan himself was the lender, and he, certainly, knew the very truth of the case. To this reasoning I do not accede. It is true that Vaughan himself was the lender, or, rather, one of the lenders of the money. But Gardner, who acted for Jones throughout the whole transaction, knew, from the very first, that the money was trust money held by Vaughan and another as co-trustees. This is obvious from his letter to Vaughan of the 12th of November, 1839; when, speaking of the value of Jones's estate, he gives him information which he desires him to communicate to his co-trustee. He also knew, or, to use his own words

in his answer to the 31st interrogatory, had reason to believe, previously to May, 1840, that the money had been remitted to Vaughan. He must, therefore, have known that the co-trustee, that is to say, the plaintiff, had, before that time, put the money into the hands of Vaughan, and, of course, that he had done so in order that it might be lent to Jones on his executing the mortgage. What Gardner knew, I must treat Jones as knowing; and if, with this knowledge, Jones chose to execute the deed, and thereby enable Vaughan to satisfy the plaintiff that he, Vaughan, had done what the plaintiff had trusted him to do, I think that Jones must abide the consequences of his act.

On these grounds I have come to the conclusion that the plaintiff has established a right, as against the estate of Jones, to be treated as a mortgagee for the full sum of 2500*l*.

It may be proper, however, to notice one or two minor points made in argument for the defendant, lest it should be supposed they have been overlooked. It was contended that the bill was framed on the supposition, not that Jones had, by his conduct in executing the deed incautiously, led the plaintiff to act on the supposition that the money had duly come to his hands, but that he, or Gardner, his agent, had wilfully permitted Vaughan to retain and misapply it. And no doubt there are many charges in the bill framed on this hypothesis, and introduced for the purpose of showing that Jones or Gardner had been privy or consenting to the misapplication of the money by Vaughan. It is due to the parties to say that the evidence wholly fails in establishing these charges; and, if the plaintiff's title to relief had depended upon their being made out, his bill must have been dismissed. There is nothing to lead to the suspicion of any unfairness in the transaction. All parties relied on the solvency of Vaughan. I see nothing like bad faith on the part either of Jones or Gardner.

But the bill, it must be observed, besides the charges of specific misapplication of the money with the connivance of Jones, contains a general charge that the money was left, by Jones, in the hands of Vaughan, contrary to the usual course of business. The bill also charges, in substance, that if, in fact, the whole of the 2500*l*. was not paid by Vaughan to Jones or according to his direction, yet that Jones, by never calling on the plaintiff for the money, led him to suppose that it had been all duly advanced; and these charges being all, as I think, fully made out in proof, seem to me to be quite sufficient to warrant the court in granting the relief asked for.

Some reliance was placed, in the argument, on the conduct of the parties after the death of Vaughan. No attempt, it was said, was made, for above a year after that event, to fix Jones with the loss occasioned by Vaughan's insolvency; and, on the contrary, those who acted for the plaintiff seemed to admit that the loss must fall on him. On the part of the plaintiff it was answered that this was done under the assurance made by Vaughan's family that they would step forward to make good the loss, in order, thereby, to save the honor of their relation and protect his memory from obloquy. It

is not necessary that I should decide how far this is made out. It is sufficient for me to say that the rights of the parties must be decided according to the facts of the case, and not according to the view of the legal and equitable consequences of those facts taken by the parties.

Another point made, or, at all events, glanced at in the argument for the defendant was, that the relief (if any) to which the plaintiff would be entitled, was not that he should be declared a creditor for the whole 2500*l.*, but only for so much as he might have recovered from Vaughan, if he had not been led, by Jones, to believe that the money had been all properly applied; and the bill, it was said, is not framed with a view to any such relief. But in a case like this, such a principle seems to me incapable of application. Where the complaint is that the defendant has omitted to do something which he ought to have done, there it is essential, in order to establish the plaintiff's title to relief, that he should show himself to have been injured by the omission complained of, and, therefore, it was that, in *Styles v. Guy*, 4 Youn. & Coll. Exch. Cases, 571, Lord Lyndhurst, on a bill seeking to charge the defendant, an executor, with a loss occasioned by his not having taken proceedings against a co-executor, directed an inquiry whether, if the defendant had taken measures for calling in the money from his co-executor, it might have been recovered. But the foundation of the plaintiff's complaint here is not any omission on the part of Jones. The plaintiff complains of an act done by Jones, whereby he was misled, whereby he was induced to act on the belief that a given state of facts existed which did not really exist. The plaintiff says, "You, Jones, told me that Vaughan had paid the money to you, and I trusted to what you said." The *onus* in this case, even if the principle be at all applicable, would be, not on the plaintiff to show that, but for the execution of the deed by Jones, he could have recovered the money from Vaughan, but on the defendants to show that he could not. And this it would obviously be impossible to establish, considering that Vaughan lived for six months after the execution of the deed, and, for aught that appears to the contrary, in good credit.

I am, therefore, of opinion that the plaintiff has made out his title to relief to the extent of being treated as mortgagee for the full sum of 2500*l.*; and the decree must declare him so entitled accordingly.

The only remaining question is that of the costs. The plaintiff must clearly have the general costs of the suit. But a considerable part of the costs has arisen from the charges in the bill, whereby the plaintiff has attempted to fix Jones, or Gardner as his agent, with knowledge of a connivance in the misapplication of the money by Vaughan. In these charges I think the plaintiff has wholly failed; and I shall, therefore, in giving him his costs, except all costs occasioned by those charges; and I shall declare the defendants to be entitled to all their costs occasioned by the introduction of such charges, to be set off against the plaintiff's general costs of the suit

Warwick v. Hooper.

WARWICK v. HOOPER.¹

July 20, 22, and 23, and December 2, 1850.

Patent — Assignment — Injunction.

The plaintiffs, the assignees of a patent, granted a license to the defendant to use the patent upon the terms of his paying an annual rent of 2000*l.*, to be made up at the end of each year, and reserved to themselves the power of determining the license in the event of default being made in payment of this rent. The defendant failed in paying the rent; but the plaintiffs, notwithstanding, for several years allowed the defendant to use the patent, and received from him a less annual sum than that stipulated. At length, however, they determined the license, having, subsequently to the expiration of the previous year, received from the defendant payments on the footing of the reduced rent:—

Held, that, by so doing, the plaintiffs had elected not to treat the previous breach as a forfeiture of the license, and that consequently they were not entitled to an injunction restraining the defendant from using the patent.

THIS was a motion to discharge an order of the vice chancellor of England, and to dissolve an injunction, by which the defendant was restrained from continuing to work and exercise a certain invention, and from manufacturing fabrics on the principle of that invention or any part thereof, or otherwise in infringement of certain letters patent, dated the 7th of April, 1842, and from selling any fabrics so manufactured since the revocation of a certain license and during the plaintiff's term in the patent.

The bill set forth that certain letters patent were, on the 7th of April, 1842, granted to John Anthony Tielien, for improvements in machinery and apparatus for knitting; that by an indenture, dated the 31st of December, 1842, and made between certain of the plaintiffs and others, stated to have become entitled to the patent, and the defendant, the said defendant was licensed to use the patented invention in the manufacture of certain fabrics during the remainder of the term for which the patent had been granted, upon the terms of paying certain dues or royalties varying according to the particular articles manufactured by the defendant, such payments to be made quarterly, on the 27th of October, 27th of January, 27th of April, and 27th of July, in each year, the first year to commence on the 27th of July, 1842; that it was stipulated in the indenture, that if in any year during the license the quarterly payment of dues should not in the aggregate equal the sum of 2000*l.*, the defendant should, within fourteen days after the expiration of every year in which such payment should fall short of such sum of 2000*l.*, make up the amount of such quarterly payment to the full sum of 2000*l.*, with a proviso, that in case of default in payment of such sum, it should be lawful for the plaintiffs or the persons who for the time being should be entitled to the patent, to determine the license by notice; that the patent, together with the dues and royalties payable under the license, had been assigned to Warwick and another, (two of the plaintiffs in the suit,) with the benefit of all covenants in trust for the

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benefit of the persons who for the time being should be interested in the patent, and that the beneficial interest at the time of filing the bill was in all the plaintiffs except the trustees.

The bill then alleged that the patented invention was new at the time of the patent, and that the patent was subsisting and in full force; that the defendant manufactured fabrics under and by virtue of the license, and that since the date of the assignment to the trustees, the defendant rendered his accounts from time to time of the quantity of the fabrics manufactured by him under the license, and paid to them the royalties appearing due upon such accounts, yet that in no one year did the royalties amount to the sum of 2000*l.*, and that the defendant had refused and neglected, contrary to the stipulation in the license, to pay such sum as with the quarterly payments would have made up the sum of 2000*l.* according to the agreement; that in consequence of such default, the power of determining the license arose and might be exercised, and that accordingly by a deed poll under the hands and seals of the plaintiffs respectively, the said plaintiffs did declare the license and power thereby granted should cease, determine, and be void, and that due notice was given of such revocation to the defendant on the 6th of April, 1850. The bill then alleged, that by the acts stated the license had become absolutely determined and put an end to, and that the defendant ought thenceforth to have ceased to use the patented invention, but that the defendant refused so to do, and continued to practise and use the said invention. The bill prayed an account of the fabrics manufactured by the defendant since the revocation of the license, and that the defendant might be decreed to pay what should be found to be due on the taking of such account, and that the defendant might be restrained from using the patented invention.

The vice chancellor of England having granted an injunction in the terms above stated, the defendant appealed to the lord chancellor.

An affidavit was filed by the plaintiffs in support of the general allegations of the bill. This was met by an affidavit on the part of the defendant, in which he set forth the patent and the license, and the substance of the covenants contained in the latter; and after stating certain applications made by him to be released from the obligation to make up the annual amount of the royalties to 2000*l.* a year, he set forth a letter of the 4th of November, 1845, from the plaintiffs, the trustees, requesting an account to be sent of the royalties payable up to the 27th of October, 1845, and requesting to know the defendant's intentions as to working the patent, as they were prepared to make a considerable reduction in the scale of charges. He then stated, that after this letter a meeting took place on the same 4th of November, 1845, between him and the trustees, and that an arrangement was then come to, which was embodied in a letter from the trustees to him, dated the same day, in which they stated that they agreed to reduce the royalties upon the goods made upon the patent knitting machines from the 27th of October, then last, and set forth certain reduced sums as the royalties to be paid in respect of specified articles; that from the 27th of October,

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1845, down to January, 1850, the defendant continued, with the plaintiffs' assent, to work under the license, and to pay royalties upon the fabrics manufactured according to the rates specified in this letter, and that from that time no demand or requisition was ever made that the amount of the royalties during the year should be made up to the sum of 2000*l.*; that accounts were rendered quarterly to the trustees upon the footing of that letter, and that the trustees acquiesced in the payments made according to such accounts. The defendant also set out a letter from the trustees to him, dated the 1st of August, 1849, acknowledging the receipt for a remittance of 174*l.*, and returning 9*s.* 6*d.* in postage stamps, leaving 173*l.* 10*s.* 6*d.*, the amount of account for royalties, as per statement, to the 27th of July, and adding that the same should be duly carried to the defendant's credit with the Patent Knitting Company; also a similar letter, dated the 8th of November, 1849, acknowledging the receipt of bills and cash 215*l.* 14*s.*, returning 7*s.* 1*d.* in postage stamps, leaving 215*l.* 6*s.* 11*d.* to the defendant's credit with the trustees for royalties to the 22d of October, as per the defendant's account; also a letter, dated the 31st of January, 1850, acknowledging the receipt on the 31st of January, by bill and postage stamps to the amount of 167*l.* 1*s.* 1*d.*, being the amount of royalties to the Patent Knitting Company to the 26th of January then last. The defendant further stated, that without any previous demand or requisition of payment, he was, on the 6th of April, 1850, served with notice of the deed of revocation of the license, upon the ground, as stated therein, that the defendant had not yearly, since the 27th of July, 1843, paid or caused to be paid the clear sum of 2000*l.* for each year's royalties, according to the reservation in the license, the notice containing also a demand of the difference between the aggregate of the quarterly payments and 2000*l.* for every year since the 27th of July, 1843. The defendant further stated, that, relying upon the continuance of the license, he had entered into contracts for the manufacture of fabrics upon the patent plan, which could not be completed in less than three months; that on the 17th of April, 1850, after the notice of revocation, the defendant discovered that the plaintiffs had, upon the 13th of April, 1849, executed a disclaimer of a part of the claim set forth in the specification under the patent.

An affidavit in reply was filed by the plaintiffs, containing a correspondence between the defendant and a former manager under the patent on the part of the plaintiffs, relative to the defendant's application for a reduction of the royalties and to be discharged from the obligation to make them up to 2000*l.* a year, and a refusal to accede to that application. The plaintiffs then referred to the meeting of the 4th of November, 1845, before mentioned, and made the following statement: "We distinctly deny that, from any thing which passed at such interview, the said defendant was justified in supposing we made him any promise that we would exonerate him from the fulfilment of his obligation under his deed of license, to pay or make up a *minimum* sum of 2000*l.* *per annum.*" In reference to the receipts mentioned by the defendant in his affidavit, the plaintiffs stated that

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they referred only to the royalties appearing to be due upon fabrics actually manufactured, and were so accepted and taken by the defendant.

With respect to the letter of the 4th of November, 1845, from the trustees to the defendant, the plaintiffs insisted that it was an agreement only to reduce certain specific rates, and left the obligation as to making up the dues to 2000*l.* a year unaffected. The defendant, however, contended that it imported an agreement not only to diminish the specific charges or royalties upon the specified articles, but also a discharge from the obligation to make up the amount of the royalties in each year to 2000*l.*

Mr. Roll and *Mr. Hallett*, for the defendant, and in support of the motion. We contend, first, that, under the construction of the clause of revocation, the plaintiffs have no right to revoke the license, the events specified in the clause having never really arisen; secondly, that, if the events have arisen, the plaintiffs, by their subsequent dealings with the defendant, have waived their right to revoke; thirdly, that the plaintiffs have not performed their part of the contract, their disclaimer of a portion of the claim set forth in the specification showing that they had not that title to the patent which they covenanted with the defendant that they had. The vice chancellor rested his decision on the case of *Elliott v. Turner*, 13 Sim. 477, which in reality is not applicable. Even if the present case can be placed as high as that of a breach of covenant in a lease by which forfeiture is incurred, it is clear that such forfeiture will be waived by a subsequent receipt of rent by the landlord. The agreement of November, 1845, when coupled with the receipt of royalties in conformity with that agreement, is sufficient evidence of waiver on the part of the plaintiffs.

They referred to the following cases in which the court refused to interfere by injunction: *Saunders v. Smith*, 3 Myl. & Cr. 711. *Bramwell v. Halcomb*, Ibid. 737. *Bacon v. Jones*, 4 Myl. & Cr. 433. *Collard v. Allison*, Ibid. 487. *Rigby v. The Great Western Railway Company*, 2 Phil. 44. *Spottiswoode v. Clarke*, Ibid. 154. In reference to the analogy between rent under a lease and the royalties in the present case, they cited *Arnsby v. Woodward*, 6 B. & C. 519.

Mr. Bethell and *Mr. Bird* for the plaintiffs, in support of the injunction. It seems to have been overlooked on the other side that the license contains a positive engagement to pay 2000*l.* a year. Although the plaintiffs have for three or four years done nothing to enforce the payment of the deficiency between the royalties received and the 2000*l.*, yet as that could not operate against their right at law, it cannot certainly have that effect in equity, which in a matter of this kind will follow the law. Such a defence, if available at all, might be in answer to a bill for specific performance, but not to the present motion. We submit that the case of *Elliott v. Turner*, 13 Sim. 477, is applicable, and that the decision of the vice chancellor is right.

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On the question of the injunction, they referred to *Hill v. Thompson*, 3 Mer. 622; *Stevens v. Keating*, 2 Phil. 333; and to *Cotter v. The Midland Railway Company*, Ibid. 469, upon the point, that the court was asked to decide on this motion what ought to be properly determined on the hearing.

Mr. Roll, in reply.

December 2, 1850. The LORD CHANCELLOR, after detailing the facts of the case in almost the precise words of the foregoing statement, which was extracted from his lordship's judgment, proceeded as follows: In the statement I have made of the effect of the affidavits on both sides, I have confined myself to such parts as appear to me to bear upon the point which must determine this application, omitting to notice much which relates to other points upon which my decision will not proceed. From what I have stated, it appears that the equity relied on, on the part of the plaintiffs, results from the following facts: that the plaintiffs are assignees of a certain patent; that the defendant accepted a license to use the patent invention upon certain terms, one of which was to pay a royalty or rent to the amount at least of 2000*l.* a year, to be made up at the end of each year in manner stated in the license, and that in default of such payment being made, the license might be determined; that the defendant has made default in such payment in every year except the first, since the license was granted; and that the plaintiffs have in consequence determined the license according to the proviso in that behalf enabling them to do so.

On the defendant's behalf, among other points not necessary to be noticed, it is insisted, first, that the condition as to the payment of the 2000*l.* yearly was dispensed with by the agreement embodied in the letter of the 4th of November, 1845; and, secondly, that if the condition as to the payment of 2000*l.* a year was not dispensed with, and the covenant to pay such sum had been broken by non-payment of such sum, yet that the plaintiffs had elected not to treat such breach as a forfeiture of the license, but to continue the license by the acceptance of payment of the royalties under the license accruing due for a period subsequent to the last breach of covenant.

I shall first consider the point, whether the license granted to the defendant by those under whom the plaintiffs claim has been legally determined, so as to make the defendant a wrong-doer as against the plaintiffs by continuing to use the patented invention, because, if the license has not determined, there is an entire failure of the equity set forth in the plaintiffs' bill; and I think this point may be determined upon principles and authorities which can be open to very little doubt or dispute. The proviso contained in the license for determining the same, upon default being made in the payment of the 2000*l.* a year, was inserted exclusively for the benefit of the grantors, and the defendant, the grantee, could in no manner by any option or act of his determine the license; nor were the grantors bound, in the event of default being made in the stipulated payments, to avoid the license,

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or to treat it as determined; and, until they the grantors should in the prescribed manner declare the option and exercise the right to treat the default as a ground of forfeiture, the license would continue in full force, notwithstanding any breaches of covenants and conditions on the part of the defendant which might have occurred. It is not necessary to cite authority for this well-established proposition.

The question to be determined is, whether the plaintiffs, by receiving royalties which accrued due for two quarters after the expiration of the year ending the 27th of July, 1849, did not treat and act upon the license as an existing and continuing license, and thereby elect conclusively not to treat the previous breaches of covenant as grounds of forfeiture, and thereby preclude themselves from afterwards determining the license upon the ground of any previous breach of covenant. The principle upon which this position depends has been frequently recognized and adopted in cases between landlord and tenant; as where a tenant has committed a breach of covenant in a lease, which the landlord, by a proviso in the lease, was authorized to treat as a forfeiture, and the landlord, with full knowledge of the breach of covenant, has afterwards treated the term as continuing, and received rent under the lease which had grown due for a period of time commencing subsequently to his knowledge of the cause for forfeiture. In such cases the receipt and acceptance of such rent under such circumstances has been held to be a conclusive election on the part of the landlord not to treat the breach of covenant as a forfeiture, and to preclude him from afterwards avoiding the lease by reason of the previous breach of covenant. I cannot perceive any distinction between the present case and the case of landlord and tenant under a lease; and it seems to me to be clear, that the receipt of the royalty under the license for the two quarters commencing after the alleged ground of forfeiture had occurred, was a conclusive election by the plaintiffs not to act upon the previous breaches of the covenants as a ground of forfeiture.

The only equity set forth in the bill is, that the defendant has used the patented invention since the license has been determined. I am of opinion that the license has not been determined, and, therefore, that the whole equity relied upon is negatived upon the affidavits; and that, therefore, the injunction must be dissolved, and the order authorizing it discharged with costs; and, as it is unnecessary for the purpose of deciding the motion, I forbear to express any opinion upon the other points which have been discussed.

Dawson v. Brinckman.

DAWSON v. BRINCKMAN.¹

July 18, 19, and 30, and December 2, 1850.

Real Estate, Purchase of—Agreement—Specific Performance.

A B became the purchaser of a mansion house and park under conditions of sale, which stated that the whole property was freehold except eight acres which were copyhold, but undistinguished except as to not including any of the buildings. The abstract of title having been delivered and discussions thereon having taken place, which raised difficulties in the way of completing the purchase, a supplemental agreement was entered into, detailing what requisitions as to title, &c., should be complied with. Among these requisitions was one in the following words: "Declaration of identity of lands mentioned in deeds to those now sold:—"

Held, on a bill filed by the vendor for specific performance, that the supplemental agreement was a substitution for the original contract, and that A B was not entitled to demand that the vendor should distinguish the freehold from the copyhold parts of the premises so as to show that the latter did not include any of the buildings.

THIS was an appeal from a decree of the Vice Chancellor Knight Bruce, directing, as against the defendant, the specific performance of an agreement for the purchase of a mansion house and certain lands attached thereto, under the following circumstances:—

The property in question, being lots one and two mentioned in certain printed particulars and conditions of sale, was therein described as being "freehold except about eight acres which are of copyhold of inheritance of the manor of Clewer, but undistinguished except as to not including any of the buildings." Of these lots Sir T. H. L. Brinckman became the purchaser by private contract on the 9th of September, 1847. An abstract of title was delivered, but difficulties occurred in completing the purchase. At last, and with the view of finally settling the terms on which the purchase should be carried into effect, a memorandum of agreement, dated the 26th of April, 1848, was entered into between the parties, the terms of which are fully stated in the judgment of the lord chancellor. It may be, however, well to state here, that among the requisitions which it stipulated should be complied with was one in the following words: "11. Declaration of identity of lands mentioned in deeds to those now sold." Immediately after this second agreement, the purchaser took possession of the property; but he subsequently became desirous of withdrawing from the purchase on the ground that the fact of the copyhold lands not including any of the buildings had not been established.

On the 25th of August, 1848, the plaintiffs filed their bill for a specific performance of the agreement. The cause was heard before the vice chancellor on the 22d of March, 1849, and on the 30th of March, 1849, his honor made the decree now appealed from, in favor of the plaintiffs.

The question in substance was, whether under the terms of the 11th requisition referred to in the agreement of the 26th of April,

¹ 3 Mac. & Gor. 53.

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1848, the plaintiffs were bound to distinguish the freehold hereditaments comprised in the original contract from the copyhold parts of the same hereditaments, with the view of showing that the latter included no part of the buildings.

Mr. Malins, *Mr. Roundell Palmer*, and *Mr. Borton*, in support of the decision of the vice chancellor, submitted that the whole question depended upon the construction to be put upon the 11th requisition as connected with the original contract; and that the vice chancellor was right in the view which he had taken, namely, that the language of the requisition in question did not extend to the matter of the tenure of the buildings. They referred to *Burnell v. Brown*, 1 J. & W. 168; and to Sugd. Vend. & Purch. vol. 2, p. 11, 12, ed. 10.

Mr. Wigram, *Mr. Rolt*, and *Mr. Craig* for the defendant, contended that the 11th requisition kept open to the purchaser the same right of identification as he had under the original contract, which was, that the copyholds included no part of the buildings, and that there was evidence sufficient to show that the mansion-house did stand on copyhold land. They submitted that neither by taking possession, which had been done under a special agreement, nor by any other acts, had the defendant waived his right to insist on the terms of the first contract. *Osborne v. Harvey*, 1 Y. & C. (C. C.) 116. *Vancouver v. Bliss*, 11 Ves. 458. *Stewart v. Alliston*, 1 Mer. 26. They further insisted, that it was contrary to the principles of the court to decree specific performance, in a case where it was clear that the title was bad. They cited also *Warren v. Richardson*, Younge, 1. *Shepherd v. Keatley*, 1 C. M. & R. 117. *Blachford v. Kirkpatrick*, 6 Beav. 232. *Crompton v. Lord Melbourne*, 5 Sim. 353. *The Marquis Townshend v. Stangroom*, 6 Ves. 328. *Harnett v. Yeilding*, 2 Sch. & Lef. 549. Story, Eq. Jur. vol. 2, pl. 742. Sugd. Vend. & Purch. vol. 1, p. 406, ed. 10.

Mr. Malins, in reply.

December 2, 1850. THE LORD CHANCELLOR. This is an appeal from a judgment of his honor Vice Chancellor Knight Bruce. The bill is filed for a specific performance of a contract for the purchase of an estate, consisting of a mansion and of a park, containing about eighty acres. The particulars of sale stated the whole to be freehold, except about eight acres which were copyhold of inheritance of the manor of Clewer, but undistinguished except as to not including any part of the buildings. The conditions of sale annexed to the particulars do not contain any thing materially affecting the question in the cause.

Under the original terms of the contract, the purchaser was entitled to call for evidence to show that the buildings stood upon freehold ground. An abstract of title was delivered, and various communications and negotiations on the subject of the title took place, into

which it is not necessary minutely to enter. They ended in a supplemental agreement of the 26th of April, 1848, embodying the terms upon which the title was to be accepted; and it is upon the effect of this supplemental agreement, as connected with the original purchase contract, that the question in the cause depends.

The supplemental agreement (in its more material parts) was as follows: "St. Leonard's estate. Memorandum to be annexed to the conditions of sale. It is agreed on behalf of the vendors and purchaser, 1st. That immediate possession of the within-mentioned estate may be taken by Sir Theodore Brinckman, baronet, upon the following understanding. 2d. That the title be accepted subject to the documents mentioned in the annexed list being furnished, and the requisitions therein being complied with, Messrs. Lacy and Co. hereby personally undertaking to furnish those documents and comply with those requisitions. 3d. That the interest upon the purchase money at four and a half per cent. from the time named in the contract for completion up to this date be divided between the vendors and purchaser, Sir Theodore Brinckman paying his moiety thereof on completion of the purchase. 4th. That interest at the rate of four and a half per cent. from this date be paid by Sir Theodore Brinckman up to completion of the purchase. 5th. That 7000*l.* part of the purchase money be allowed to remain on mortgage at four and a half per cent. for a term of years, and that the mortgage and conveyance be completed on the 6th of May next. 6th. The usual searches to be made on both sides, and any incumbrances to be disclosed by such searches to be discharged."

The list annexed of documents to be furnished, and requisitions to be complied with, was numbered from 1 to 16 inclusive, those material to the present question being Nos. 11 and 16. They are as follows: "11th. Declaration of identity of lands mentioned in deeds to those now sold. 16th. The declaration of identity before alluded to should show that the road across the crown allotment and through Lord Harcourt's park is the same road as existed in 1776, as mentioned in the Duke of Gloucester's Act."

The VICE CHANCELLOR expressed his opinion to the following effect:—

I think it impossible to interpret the 11th requisition in the manner suggested on the defendant's part; it appears to me, that it purports to demand only the identification of the property whether freehold or copyhold, both which the particulars of sale had described, with the property whether freehold or copyhold or both to which the abstracts profess to show a title in the plaintiffs, not the distinguishing of any part as freeholds or of any part as copyholds, a view of its construction not in my opinion removed or weakened or opposed by the last requisition. The decree made by his honor ordered and decreed that the agreement of the 9th day of September, 1847, should be specifically performed and carried into execution, but subject to the agreement of the 26th day of April, 1848; and declaring that the parties were bound by the latter agreement, it declared also that, according

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to the true construction of the 11th requisition forming part of it, that requisition does not demand or extend to the distinguishing of the freehold hereditaments comprised in the former agreement, or any part of them, from the copyhold hereditaments comprised in it, or any part of them.

I am of opinion that this decree is correct. No. 11 of the schedule to the supplement to the agreement was intended as a substitute for the original contract in respect to the identity and tenure of the property. The contract was entered into by the purchaser in entire ignorance of the state of the title. The supplemental agreement was entered into after the investigation of the title by him, and it cannot receive such a construction as to restore the original right for which it was to be a substitute.

So far as regards the question in this cause, the title was to be accepted upon "a declaration of identity of lands mentioned in deeds to those now sold." This is the language of No. 11, the true construction of which, connected with No. 16, appears to me to be, that the purchaser was to be supplied with evidence that the lands sold were comprised either as freehold or as copyhold in the title produced, but without any obligation on the part of the vendor to distinguish the freehold parts from the copyhold parts, which the purchaser contends he was still bound to do. There is no ground for, nor does the purchaser affect to make out, any case of fraud or surprise. He in effect agreed to take upon himself the risk of what might be freehold and what might be copyhold, provided the whole of the estate either as of the one tenure or of the other was shown to be comprised in the titles already produced. It is admitted that this has been done, but it is contended by the purchaser, that the buildings now prove to be on the copyhold parts of the estate. Whether this be so in fact may admit of doubt, but whether it be so or not, I consider immaterial; the purchaser took upon himself the risk of that, and he cannot now be allowed to repudiate the contract, because the result of that risk may be adverse to his interests and expectation. The appeal, therefore, will be dismissed with costs.

It was objected that the decree was defective for want of a declaration as to the construction of the contract and supplemental agreement; but the extract which I have read from the decree shows there is no ground for this objection.

In re Cross's Estate, &c., ex parte Flamank & others.

*In re Cross's ESTATE AND OF THE LANDS CLAUSES CONSOLIDATION ACT, 1845, AND OF THE EAST LINCOLNSHIRE RAILWAY ACT, ex parte FLAMANK & others.*¹

January 10 and 20, and February 22, 1851.

Lands Clauses Consolidation Act — Reinvestment of Compensation Money — Conversion.

Money paid into court by a railway company for land taken under the Lands Clauses Act, from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not the subject of a commission of lunacy, ordered after his death not to be reinvested in, or considered as land, but to be paid to his executors.

T. L. CROSS, late of Louth, in the county of Lincoln, miller, by his will, dated in 1839, devised his residuary real estate to trustees, in trust, in equal third parts, for his three nieces, the petitioners, for their separate use for life, with remainder for their children in fee; and he bequeathed his residuary personal estate to the petitioners, share and share alike, and appointed them the executrixes of his will.

The East Lincolnshire Railway Act was passed in 1846, and the Companies Clauses, the Lands Clauses, and the Railway Clauses Consolidation Acts were incorporated with it. In November, 1848, at which time Cross had become paralytic and wholly incapable of transacting or even attending to business, the company took possession of part of his land comprised in the residuary devise in his will, for the purposes of their undertaking, and served him with notice, under the 18th section of the Lands Clauses Acts, that they were willing to treat for the purchase thereof. No attention was paid to that notice; in consequence of which the company procured a jury to be summoned to determine the amount of the purchase money; but neither Cross nor any person on his behalf appeared on the inquiry before the jury; whereupon the amount of the purchase money was determined, by a surveyor appointed by two justices of the peace, to be 740*l.*; and in April, 1849, the company paid that sum into court, to the credit of *ex parte* the East Lincolnshire Railway Company, the account of T. L. Cross of Louth, in the county of Lincoln, miller. (See Lands Clauses Act, sects. 47, 58, and 76.)

Cross continued in a state of mental imbecility until his death. He died in January, 1850, but without having been the subject of a commission of lunacy. The petition was presented in April, 1850, at which time all the petitioners were married, but only one of them had issue. It stated that the petitioners or their husbands had not settled or agreed to settle their shares of the 740*l.*, and prayed that one third part of that sum might be paid to each of their husbands, or if the court should be of opinion that the 740*l.* was to be considered in equity as *part of Cross's residuary real estate*, then that it might be invested in consols, in the name of the accountant general, to the credit of *ex parte* the East Lincolnshire Railway Company, the

¹ 1 Sim. (N. S.) 260.

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account of the devisees of T. L. Cross, late of Louth, in the county of Lincoln, miller; and that one third of the dividends might be paid to each of the petitioners, on her separate receipt, till further order. (See sects. 69 and 70.)

Mr. Bethell and *Mr. Shapter*, in support of the petition, referred to the 7th, 76th, 77th, and 78th sections of the Lands Clauses Act, and said, that if the owner of land taken by a company for the purposes of their undertaking failed to appear on the inquiry before a jury, the purchase money, whatever might be the cause of the owner's default, was to be paid into court, under the 76th section; and that the 78th section directed the court to distribute it, *as personally*, amongst the parties entitled to it.

Mr. Lloyd, for the trustees of Cross's will and infant children of one of the petitioners, said that Cross was in a state of mental incapacity at the time when the company took his land, and continued in that state until his death; and that, though no committee of his estate was ever appointed, yet the enactments of the Lands Clauses Act, with regard to persons in his unfortunate condition, applied; and, therefore, the 740*l.* ought to be reinvested in land under the 69th section, and the land be conveyed to the trustees upon the trusts of his will. *Mr. Lloyd* cited *The Midland Counties Railway Company v. Orwin*, 1 Coll. 74, see 80; and said that the 44th and 47th sections¹ of the act on which the question in that case arose were substantially the same as the 76th and 78th sections of the Lands Clauses Act.

¹ The 44th section is stated, shortly, in *Mr. Collyer's* report of the case cited, and fully, in the judgment in this case. The 47th section is as follows: "And be it further enacted that, in case any party to whom any money shall be agreed or awarded to be paid for the purchase of any lands to be taken or used under or by virtue of the powers of this act, or for any interest or for compensation as aforesaid, shall refuse or neglect to accept the same, or cannot be conveniently found, or shall be absent from the United Kingdom of Great Britain and Ireland, or shall refuse, neglect, or be unable to make a title to such lands, or to such interest in the premises, to the satisfaction of the said company, for the purposes of this act, or if the party entitled unto, or required, by the said company, to convey or join in conveying such land, or such interest therein, shall not be known, or be not shown, to the satisfaction of the said company, to be such party, or shall refuse to convey or to join in conveying the same, then and in every such case, where not otherwise provided by this act, it shall be lawful for the said company to order the money so agreed, offered, intended to be offered, or awarded as aforesaid, to be paid into the Bank of England in the name and with the privity of the accountant general of the Court of Exchequer, to be placed to his account to the credit of the parties interested in said lands, (describing them, so far as the said company can so do,) subject to the control and disposition of the said court; which said court, on the application of any party making claim to such money or to any part thereof, by petition, is hereby empowered, in a summary way of proceeding or otherwise, to order the same to be laid out and invested in the public funds, and to order distribution thereof, or payment of the dividends thereof, according to the estate, title, or interest of the party making claim thereunto, and to make such other order in the premises as to the said court shall seem proper; and the cashier of the Bank of England, who shall receive such money, is hereby required to give, to the said company, or to any party paying any money into the Bank of England under or pursuant to this act, a receipt for such money, mentioning and specifying therein for what and for whose use (described as aforesaid) the same is received."

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Mr. Bethell, in reply, said, that the Lands Clauses Act contained no direction that the purchase money, for land taken from a person in a state of mental incapacity, should be dealt with otherwise than under the 78th section, unless he had been found to be either a lunatic or an idiot, and the land had been sold by the committee of his estate; in which case the money was to be reinvested in land; that, by the Midland Counties Railway Act, failure to appear on an inquiry before a jury and mental incapacity were put on the same footing; but that was not the case in the Lands Clauses Act; and he cited *Ex parte Hawkins*, 13 Sim. 569; and also *Oxenden v. Lord Compton*, 2 Ves. Jun. 69; and *Ex parte Clayton*, 1 Russ. & Myl. 369, in order to show that there was no equity between real and personal representatives.

The VICE CHANCELLOR. The petition in this case was presented by the executrixes of a deceased gentleman of the name of Cross, praying that the sum of 740*l.*, which had been paid into court by the East Lincolnshire Railway Company, for lands of which the deceased had been seized in fee and which the company had taken for the purposes of their undertaking, might be paid out to the petitioners in certain shares. I should have ordered the money to be paid to them, as a matter of course, if an affidavit had not been filed stating that Cross, at the time when the company gave him notice of their intention to take his land, and until his death, was in a state of mental imbecility; and I shall decide who are the parties entitled to the fund in court, on the assumption that that was the case.

The question depends upon the construction of the Lands Clauses Consolidation Act, 7 & 8 Vict. c. 18. The 7th section of that act says, that it shall be lawful for all parties being seized of any lands, which the promoters of the undertaking may require for the purposes of their undertaking, to sell and convey the same to the promoters, and to enter into all necessary agreements for that purpose, and, particularly, that it shall be lawful for corporations, tenants for life, &c., so to do. So that all persons are enabled to sell and convey; and it was contended that, as Cross was seized in fee, he would not have wanted any authority to sell and convey, unless he had been in a state of mental imbecility; and that the words, "it shall be lawful for all persons," &c., gave him that authority. But I do not think it will be necessary to decide whether authority was given to him by those words or not. For it is certain that the company did not, in this case, get the lands by agreement. What, then, is the way of getting possession of lands otherwise than by agreement? Sect. 18 says, that when the promoters of the undertaking shall require to purchase or take any of the lands which they are authorized to purchase or take, they shall give notice thereof to the parties interested in such lands, or to the parties enabled by the act to sell and convey the same; and by such notice shall demand, from such parties, the particulars of their estate and interest in such lands and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the

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undertaking are willing to treat for the purchase thereof. Now, that notice was given to Cross. Then sect. 21 enacts, that if the party to whom such notice has been given shall fail, for twenty-one days after the service of it, to state the particulars of his claim in respect of such land, or to treat *or agree* with the promoters in respect thereof, the amount of the compensation to be paid to him shall be settled in the manner thereafter provided for settling cases of disputed compensation. Then the act provides two modes of settling disputed claims to compensation; one is by arbitration, which is out of the question here, the other is by a jury; and, with respect to that, sect. 38 provides, that, before the promoters shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned, and in such notice the promoters shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party. That also was done. Then sect. 39 enacts, that in every case in which any such question of disputed compensation shall be required to be determined by the verdict of a jury, the promoters of the undertaking shall issue their warrant to the sheriff, requiring him to summon a jury for that purpose. That too was done, and the jury met, but Cross did not attend; and in such a case the 47th section says, that the inquiry shall not be further proceeded in, but the compensation shall be ascertained by a surveyor appointed by two justices of the peace. Accordingly a surveyor was appointed, pursuant to the 58th section, and he ascertained the compensation to which Cross was entitled, in respect of his land, to be 740*l.*; and that sum was paid into the bank, under the 76th section, which directs that the purchase money shall be paid into the bank in the name of the accountant general, to the credit of the parties interested, (that is, in this case, to the credit of Cross,) if the owner of the land fails, as was the case here, to appear on the inquiry before the jury. Then sect. 78 directs what is to be done with the money when it is in the bank. It says that, upon the application by petition of any party making claim to the money or any part thereof, or to the lands in respect whereof the same shall have been deposited, or any part of such lands, or any interest in the same, the Court of Chancery may, in a summary way, as to such court shall seem fit, order such money to be laid out or invested in the public funds, or may order distribution thereof, or payment of the dividends thereof, according to the respective estates, titles, or interests of the parties making claim to such money or lands, or any part thereof, and may make such other order in the premises as to such court shall seem fit. Under that section the executrixes of Cross claim the 740*l.*, as being the purchase money to which Cross was entitled for the land taken by the company.

Now did sect. 7 authorize Cross to sell, or did it not? If it did, the effect, in my opinion, was to make his contract as good as if he had been *compos mentis*, and his executrixes would clearly be entitled to the 740*l.* He was compelled to sell; but, when he had sold, he stood in the same situation as he would have been in if he had been *compos mentis*, and had sold voluntarily.

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If he was not authorized to sell, and therefore the company were not justified in taking his land under the compulsory powers of the Lands Clauses Consolidation Act, still the devisees under his will cannot be entitled to the money. Their claim would be to the land, and not to the money. And it does not lie in the mouth of the company to make the objection, for they have taken the land; and therefore they cannot say that there was no authority to take it. Therefore I can deal with the money in no other way than as if it had been paid for the purchase of land sold by a person seized in fee, and who was competent to sell it.

It was observed, in the course of the argument, that the 78th section of the act empowers the court to order the money in court to be invested in the funds, or to order distribution thereof, or payment of the dividends thereof, according to the respective estates, titles, or interests of the parties making claim to such money or lands. But that gives no claim to the parties who are entitled in remainder under Cross's will. Those words were necessary, because the persons seized of the lands in respect of which the money had been paid into court might be seized as joint tenants, or tenants in common, or as tenant for life and remainder-man.

I hesitated to give judgment in this case, because I was informed that Vice Chancellor Knight Bruce had decided that money paid for land taken by a railway company from a person in a state of mental imbecility, was to be considered as land. But on looking at the act on which the case before him arose, I found that it contained a provision differing very materially from the provisions of the act on which I am now adjudicating. It was a local act passed in the 6 Will. 4, and therefore long before that act. It contained a section corresponding very nearly with the 7th section of the Lands Clauses Act. The 14th section empowered all corporations, tenants in tail or for life, trustees, &c., and all other persons whomsoever, to contract for the sale of the lands of which they were seized, and to convey the same to the company. That section seems to me to be very much in conformity to the 7th section of the Lands Clauses Act. Then observe what follows in sect. 31 of the local act. It says, that if any persons thereby capacitated to sell should neglect or refuse to treat, or should not agree with the company for the sale of their estates or interests, or should, by reason of absence, be prevented from treating, or should, by reason of any impediment or disability, whether provided for by the act or not, be incapable of making such agreement, conveyance, or release, as should be necessary or expedient for the purpose of enabling the company to take such lands or to proceed in making the railway, or in any other case where an agreement for the purchase of lands could not be made, then, and in every such case, the company should and were thereby required to issue a warrant to the sheriff, commanding him to summon a jury to inquire as to the sum of money to be paid for the purchase money of the land to be taken.

It is quite clear, therefore, that when the company wanted the lands of any person who was incapable of agreeing for the sale of them, it was their duty to have the sum to be paid for them ascertained by a

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jury. Then sect. 44 enacts, "that if any money shall be agreed or awarded to be paid for the purchase of any lands to be taken or used by virtue of the powers of this act, or of any interest therein, or for any compensation or satisfaction under this act, which any corporation, trustee, or feoffee in trust, or any person whomsoever having no power to convey the premises in respect of which the same may be payable, otherwise than by virtue of this act, shall be entitled unto or interested in, such money shall, in case the same shall amount to or exceed the sum of 200*l.*, with all convenient speed, be paid into the Bank of England, in the name and with the privy of the accountant general of the Court of Exchequer, to be placed to his account there, *ex parte* "The Midland Counties Railway Company;" and shall, when so paid in, there remain until the same shall, by order of the said court made in a summary way upon petition to be presented to the said court by the party who would have been entitled to the rents and profits of the said lands, to be applied either in the purchase or redemption of the land tax, or in or towards the discharge of any debt or other incumbrance affecting the said lands, or affecting other lands standing settled therewith to the same or the like uses, trusts, intents, or purposes, as the said Court of Exchequer shall authorize to be purchased or paid, or such part thereof as shall be necessary; or until the same shall, upon the like application, be laid out, by order of the said court made in a summary way as aforesaid, in the purchase of other lands, which shall be conveyed, limited, and settled to, for, and upon such and the like uses, trusts, intents, and purposes, and in the same manner as the lands which shall be so purchased, taken, or used as aforesaid, or in respect of which such compensation or satisfaction shall be paid, stood settled or limited, or such of them as, at the time of making such conveyance and settlement, shall be existing, undetermined or capable of taking effect; and, in the mean time and until such purchase can be made, the said money may, by order of the said court upon application thereto, be invested by the said accountant general in his name in the purchase of 3*l.* per cent. consolidated, or 3*l.* per cent. reduced bank annuities, or in government or real securities; and in the mean time, and until such annuities or securities shall be ordered by the said court to be sold for the purposes aforesaid, or shall be called in or cancelled, the dividends or interest and annual produce thereof shall, from time to time, by order of the said court, be paid to the party who for the time being have been entitled to the rents and profits of such lands so to be purchased and settled." That is an express provision that when any person has his lands taken under the powers of the act, the money paid for them shall be re-invested in the purchase of land. Therefore, the decision to which Vice Chancellor Knight Bruce came in that case was right under the express terms of the local act. But the language of the general act is, as I have pointed out, very different; and so I do not feel myself pressed by that decision. I must treat the money as being paid in by a party seized in fee and competent to sell; and, therefore, I shall order it to be paid out to the executrixes of Cross.

The costs which the company are liable to must be paid by them, and the extra costs must come out of the fund.

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MACINTYRE v. CONNELL.¹

January 15 and 22, and March 1, 4, and 5, 1851.

*Public Company not incorporated—Stat. 1 & 2 Vict. c. 110, s. 14—
Parties and Pleading—Demurrer—Costs—Amendment.*

A banking copartnership which made returns to the stamp office pursuant to 7 Geo. 4, c. 46, held to be a public company not incorporated within the meaning of 1 & 2 Vict. c. 110, s. 14.

A filed a bill against B and the public officer of a banking company, seeking to make certain shares, which B held in the bank, available to the payment of a debt due to him from B. The bill alleged that, though the company had a prior charge on the shares for a debt due to them from B, yet that debt was amply secured by the shares of other persons in the bank, and by other securities held by the company; and it prayed that *an account might be taken of what was due to the company in respect of their charge; and that directions might be given for the satisfaction thereof out of the last-mentioned shares, and out of or by means of the other securities held by the company, or for enabling A to pay to them the amount of their charge, and, thereupon, to have such other securities assigned to him; and, that the securities might be marshalled, so as to give the plaintiff the benefit of his charge.*

A demurrer, because the persons who had pledged their shares and given securities to the company for B's debt, were not made parties to the bill, was allowed.

A bill contained a charge with a view to discovering who certain persons, who were interested in the relief, were; but it did not allege that the plaintiffs did not know who they were; and, therefore, a demurrer because they were not made parties was allowed.

The demurrer on the record having been allowed, and a demurrer *ore tenus*, for want of parties, having been overruled, the court ordered the defendants to pay the costs of the former, but made no order as to the costs of the latter; and gave the plaintiff leave to amend either by adding parties, or striking out the passages which made the new parties necessary.

THE bill was filed by the secretary to the United Kingdom Life Assurance Company, for and on behalf of the company, and by the trustees of that company, against John Connell, George Webster, and Mark Boyd, and certain other persons, who were the directors and public officers of the Union Bank of London. It stated an act of Parliament, passed in the 4 Will. 4, by which the assurance company were enabled to sue and be sued in the name of one of their directors, or their secretary; and that, on the 29th of November, 1845, Connell, Mark Boyd, J. W. Sutherland, (who was a director,) Webster, and William Sprott Boyd, procured 10,000*l.* from the company, and gave their joint and several promissory note for it, payable twelve months after date, to the trustees of the company; that the 10,000*l.* was not paid when it became due; that the company recovered judgments in three separate actions on the note, against Connell, Webster, and Mark Boyd, after the signing of which, and on the 10th of April, 1850, a payment of 3000*l.* was made, on account of the note.

The bill then stated, that there was a certain public company, called the Union Bank of London, established in 1839, for the purpose of carrying on the business of bankers or of banking, according to the provisions of a deed of settlement, dated the 5th of April, 1839, which provided that the capital of the company should be 3,000,000*l.*, divided into sixty thousand shares of 50*l.* each. That the capital of the com-

¹ 1 Sim. (n. s.) 225.

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pany should be used and employed in the business of the company, and each of the proprietors should be entitled to the profits, and liable to the losses of the company, in proportion to his share. That no benefit of survivorship should take place between the proprietors; and all the real property of the company should, as between the proprietors and their respective real and personal representatives, be considered as personal property, and be transmissible as such. That the directors should have the management of the business of the concerns of the company, and should appoint such of their body as they should think fit, to be trustees of the property of the company, and that the trustees should be under the order and control of the directors. That the business of the company should be carried on in the names of such of the trustees as the directors should appoint; and all contracts, securities, estates, and effects entered into, and taken or given, on behalf of the company, should be entered into and taken or given by the trustees, unless the directors should otherwise direct; and all suits respecting the property of the company should be carried on in the names of the trustees; and that they should be removable at the pleasure of the directors. That the directors, if they should think it desirable, might apply for and obtain a charter of incorporation, or letters patent from the crown, for granting to the company all or any of the powers or immunities which the crown was or might be able to confer on trading or other companies, and might obtain an act of Parliament for better carrying on the business of the company, either as a corporation or otherwise; and that, for the purpose of obtaining such charter, letters patent, or act, the directors might subject the proprietors to such individual liability, as to their persons and properties, as might be imposed by way of condition for obtaining the said charter, letters patent, or act, and might comply with any conditions or restrictions that the crown or Parliament might think proper to impose, notwithstanding the same might be inconsistent or at variance with the provisions of the now stating deed; and that the directors might, by or out of the funds of the company, defray the expenses incident to the application for such charter, letters patent, or act, and to the procuring of the same, in case the same should be procured, and with a view or for the purpose of bringing the company within the provisions of the act of Parliament, then lately passed, for the better enabling her majesty to confer certain powers and immunities on trading and other companies. That the directors might purchase, for the use of the company, any shares in it which might be offered for sale, and that the shares which should be so purchased should be considered as part of the property and effects of the company. That, if any proprietor should do any act whereby he should become entitled to the benefit of any act of Parliament for the relief of debtors, and by reason or in respect whereof an assignment of his estate and effects should be made for the benefit of his creditors, or if any order, judgment, or decree should be made, whereby the shares of any proprietor should be attached or affected, and of which the secretary or manager or any of the trustees should have notice, the proprietor by whom such act should be done, or whose shares should be attached or affected by

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such order, judgment, or decree, should, upon the commencement and prior to the completion of the doing of such act, or of the making of such order, &c., forfeit his shares to the company, and all profits then due or accruing due thereon, and all other rights and privileges in respect thereof, as from the commencement of the doing such act, or of the making of such order, &c.; and such proprietor should cease to be a proprietor as from the commencement of the doing such act, or of the making of such order, &c., and the directors should cause such shares, profits, rights, and privileges to be sold, and should pay the net produce thereof, after retaining the amount of any lien, to the assignees of the proprietor's estate, or to the person in whose favor such order, &c., should be made. That it should be lawful for any proprietor, or his legal personal representatives, to sell and transfer all or any of the shares held by him, provided the approbation of the directors to such transfer should be first obtained, and provided the same should be testified by the execution of the deed of transfer by the secretary, or some other officer of the company.

The bill next stated that, previously to and at the time of making the orders thereafter mentioned, Connell, Webster, and Mark Boyd held four hundred, twenty, and thirty shares in the company respectively; that, on the 13th of April, 1850, Mr. Justice Talfourd, one of the judges of the Court of Common Pleas at Westminster, made three orders *nisi* (which were subsequently made absolute) under the 14th section of the 1 & 2 Vict. c. 110, charging the shares of Connell, Webster, and Mark Boyd with the sums for which the judgments had been recovered against them respectively; that Connell, Webster, and Mark Boyd insisted that the Union Bank of London *was not a public company* existing in England within the meaning of the 1 & 2 Vict. c. 110, so as to entitle the plaintiffs to all such remedies as they would have been entitled to, under that act, *in respect of shares in a public company*; whereas the plaintiffs charged that the Union Bank of London was a partnership, whereof the capital was divided or agreed to be divided into shares, and so as to be transferable without the express consent of the copartners; and that any number of strangers might, with the consent of the board of directors, be introduced into the said company, not only without the consent of the individual partners, but notwithstanding their express dissent; that the Union Bank of London, immediately on the passing of the 7 & 8 Vict. c. 113, (to regulate joint-stock banks in England,) availed itself of the provision of that act, whereby it was provided that every company of more than six persons established, on the 6th day of May, 1844, for the purpose of carrying on the business of bankers within sixty-five miles from London, should have the same powers and privileges of suing and being sued in the name of one of their public officers, and that all judgments, decrees, and orders made and obtained in any such suit, might be enforced in like manner as was provided with respect to such companies carrying on business beyond sixty-five miles from London, under the 7 Geo. 4, c. 46; provided the company should make out and deliver, to the commissioners of stamps and taxes, the several accounts or returns

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required by that act; and that the said company had made out and delivered such accounts and returns; that the shares in the Union Bank of London had been, since the first establishment thereof, and were, as a matter of course, bought and sold on the stock exchange; and that the market price thereof had been and was periodically published in Wettenhall's share and stock lists. The bill prayed for a declaration that the judgments against Connell, Webster, and Mark Boyd were charges, respectively, upon their shares in the Union Bank of London, and that an account might be taken of what was due to the plaintiffs, in respect of such judgments, and that the other defendants, the directors of the Union Bank, might be ordered to sell the said shares, and to pay over to the plaintiffs the proceeds thereof, or so much as might be required, in or towards satisfaction of the said debt.

Connell demurred. The grounds stated on the record were, first, want of equity; and, secondly, because it appeared, by the plaintiffs' own showing, that William Sprott Boyd was a necessary party to the bill, inasmuch as it was therein stated that William Sprott Boyd did, together with Connell, Mark Boyd, Sutherland, and Webster, make their joint and several promissory note for 10,000*l.* in the words and figures in the bill set forth, and in respect of which promissory note several judgments were, by the plaintiffs, as was alleged in the bill, recovered, and in respect of which judgments several judges' orders, as in the bill alleged, were obtained, and which judges' orders, as appeared by the bill, purported to charge, as in the bill was alleged, certain shares in the Union Bank of London.

Mr. Stuart and *Mr. Charles Webster* said, in support of the first ground of demurrer, that a public company was a company incorporated, either by act of Parliament or by royal charter, for the purpose of carrying on an undertaking of a public nature; that the Union Bank of London was not incorporated, nor was it formed for the purpose of carrying on an undertaking of a public nature, but that it was a mere private banking copartnership; and, therefore, the shares in it were not chargeable under the 14th section of the 1 & 2 Vict. c. 110.

Mr. Bethell, *Mr. W. M. James*, and *Mr. Willes*, in support of the bill, referred to 7 Geo. 4, c. 46, 1 & 2 Vict. c. 110, and 7 & 8 Vict. c. 113,¹ and said that, in the view of the legislature, every company was a public company of which the capital was divided into shares transferable without the consent of *all the members of the company*, which might sue and be sued in the name of one of its public officers; and which made returns from which the names and places of abode of its members, and the state of its affairs, might be ascertained; and that the Union Bank of London had all those elements

¹ The sections of these acts, relevant to the question raised by the demurrer for want of equity, are fully stated in the judgment.

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of publicity, and therefore it was a public company; and the shares in it were chargeable under the 14th section of the 1 & 2 Vict. c. 110. They cited *Graham v. Connell*, 19 Law J. Rep. (N. S.) Exch. 361.

Mr. Stuart replied.

The VICE CHANCELLOR. The main question in this case is, whether the Union Bank of London is a public company within the 1 & 2 Vict. c. 110, s. 14. By that section it is enacted that, if any person against whom any judgment shall have been entered up in any of her majesty's superior courts at Westminster shall have any government stocks, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not) standing in his name in his own right, or in the name of any other person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favor by the judgment debtor. The present bill was filed by Patrick Macintyre, the secretary of the United Kingdom Life Assurance Company, on behalf of the company, and also by certain other gentlemen who are trustees of the property of that company, which was established by a private act of Parliament passed in the 4 Will. 4.

The statement in the bill is that a certain promissory note, dated in November, 1845, was made by John Connell, Mark Boyd, John William Sutherland, George Webster, and William Sprott Boyd, and, by them, given to the former trustees of the society, to secure a sum of 10,000*l.* due from them to the insurance office; and that the note was not paid, and an arrear of interest accrued due thereon. The bill, therefore, is filed by the secretary of the insurance company and the trustees of that company as the holders of the promissory note; and it states that there is a certain public company called the Union Bank of London, established in the year 1839, for the purpose of carrying on the business of bankers or of banking upon the terms and subject to the covenants, rules, regulations and provisions contained in a certain indenture or deed of settlement dated the 5th of April, 1839, &c., &c. And it prays, &c.

The defendant, Connell, who is the holder of four hundred shares in the Union Bank of London, has demurred to the bill in this way, &c., &c.

Now, that being the state of the record, the question, as I stated before, is, whether the Union Bank of London is a public company within the statute of Victoria which I have referred to.

The real difficulty which arises on this subject is, that the statute speaks of a public company, whether incorporated or not, as being something known to the law, that is, as if it were something that,

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when mentioned, a court could be able to say, *ex cathedra*, "This is or is not a public company;" there being, in truth, no such legal term known as a public company not incorporated. Then the question is, there being no legal meaning to the term, "public company," How are the courts to interpret that term?—because it would be very improper to say that the legislature has used words that could have no meaning; and, therefore, we must find out, as well as we can, what meaning is to be attributed to the words. And that must be ascertained by discovering what the state of the law was, in respect of companies, at the time of the passing of the act of the 1 & 2 Vict.; because it must be with reference to the then state of the law that the question is to be determined, and not by the state of the law at any subsequent period, although, perhaps what passed subsequently may enable us to interpret, in some degree, the language used by the legislature upon a prior occasion; but it cannot, of itself, give us the meaning.

Now it appears to me, having looked at the matter with some care, that there were only two classes of companies to which, by possibility, at that time, the expression, "public company not incorporated," could apply. What was the state of the law at that time? In the first place, there was the statute of the 7 Geo. 4, c. 46, for the better regulating copartnerships of certain bankers in England. It is well known that, prior to that act, nowhere within her majesty's dominions, at all events nowhere in England, could more than six persons associate together for the purpose of carrying on the banking business. The Bank of England were interested in sustaining that privilege upon their part. They had advanced large sums of money to the government; and their remuneration, in part, was that they were to have a monopoly in banking, except where there should not be more than six partners. But that monopoly was restricted, in the first instance, by the act to which I have alluded, the 7 Geo. 4, c. 46, which enabled partnerships consisting of more than six members to carry on the business of bankers, provided only they carried it on sixty-five miles or upwards from London; and provided they carried it on under the restrictions and in the manner provided by that act of Parliament, which were, that they should make regular returns of the names of all the parties to the stamp-office. That list was to be amended, from time to time, when a transfer of the shares took place; and they were to return to the stamp-office the names of two or more persons, to be called the public officers of the bank; and parties having claims upon the bank were not to sue the bank as a partnership, according to the ordinary rule of common law, but were to sue the public officers instead; and those public officers were, for the purposes of the act, to represent the company. On the other hand, if the copartners had any claims against third parties, they were to sue, not in the ordinary mode in which partnerships, independent of that act, would sue, but by their public officers; and the effect of a judgment against the public officer was, that you might take out execution under it against the partnership and every member of it. Now that act was in force at the time of the passing the 1 &

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2 Vict. c. 110. In the year 1833, the 3 & 4 Will. 4, c. 98, was passed, and, by it, banking copartnerships consisting of more than six members were permitted to carry on business in London or within sixty-five miles of it, on certain terms. Now let us see whether there were any other companies to which the language of the 1 & 2 Vict. c. 110, can be held to apply. There certainly was one other class of trading companies, because, by the act which was passed in 1837, namely, the 7 Will. 4, and 1 Vict. c. 73, intituled, "An Act for better enabling her majesty to confer certain powers and immunities on trading and other companies," power was given to the crown not to incorporate partnerships, but to grant them privileges which by common law would not be granted, namely, to trade under liabilities to a certain degree restricted. The principal provisions of that act are these: The second section enacts that it shall be lawful for her majesty, by letters patent, to grant to any company or body of persons associated together for any trading or other purposes, although not incorporated by such letters patent, any privileges or privilege which, according to the rules of the common law, it would be competent to her majesty to grant to any such company or body of persons in and by any charter of incorporation. The next section is: "And be it enacted that, in any such letters patent so to be granted as aforesaid by her majesty to any such company or body of persons so associated as aforesaid, but not incorporated, it shall and may be lawful, in and by such letters patent, either expressly or by a general or special reference to this act, to provide and declare that all suits and proceedings, whether at law, in equity, or in bankruptcy or sequestration, or otherwise howsoever, as well in Great Britain and Ireland as in the colonies and dependencies thereof, by and on behalf of such companies or body, or any person or persons as trustee or trustees for such company or body; against any person or persons whether bodies politic or others, and whether members or not of such company or body, shall be commenced and prosecuted in the name of one of the two officers for the time being appointed to sue and be sued on behalf of such company or body, and registered in pursuance of the directions of such appointment and registration respectively herein-after contained; and that all suits and proceedings, whether at law or in equity, by or on behalf of any person or persons, whether bodies politic or others, and whether or not members of such company or body, shall be commenced and prosecuted against one of such officers, or, if there shall be no such officer for the time being, then against any member of such company or body: provided nevertheless that nothing in this act or in such letters patent contained or to be contained shall prevent the plaintiff from joining any member of such company or body, with such officer, as a defendant in equity, for the purpose of discovery or in case of fraud." The 4th section is: "And be it enacted that it shall and may be lawful, in and by such letters patent so to be granted to any such body or company as aforesaid, to declare and provide that the members of such company or body, so associated as aforesaid, shall be individually liable, in their persons and property, for the debts, contracts, engagements and

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liabilities of such company or body, to such extent only per share, as shall be declared and limited by such letters patent; and the members of such company or body shall, accordingly, be individually liable for such debts, contracts, engagements and liabilities respectively, to such extent only per share as, in such letters patent, shall be declared and limited; such liability, nevertheless, to be enforced in such manner and subject to such provisions as are hereinafter contained." Then the 5th section says, "And be it enacted that every such company or body to which any such privileges or powers as hereinbefore mentioned shall be granted under the authority of this act, shall be entered into or formed by a deed of partnership or association, or an agreement in writing of that nature; and the undertaking shall, by such deed or agreement, be divided into a certain number of shares to be there specified; and in such deed or agreement, or in some schedule thereto, there shall be set forth the name or style of the said company or body, the names or styles of the members of the said company or body, the date of the commencement thereof, the business or purpose for which the said company or body is formed, and the principal or only place for carrying on such business; and, in such deed or agreement, there shall also be contained the appointment of two or more officers to sue or be sued on behalf of such company or body in manner hereinafter mentioned." And then, just in the same way as in the Bank Act of the 7 Geo. 4, a return is to be made, to certain public officers, of the names and addresses of the members, and the number of the shares they respectively hold; and that is to be renewed, from time to time, as changes take place. And there is a great number of other clauses, but I am not aware that it is necessary to advert to them for the present purpose. That, therefore, was a class of companies not incorporated, or which might come under the description of public companies not incorporated, which existed at the time of the passing the 1 & 2 Vict. c. 110. Now those two classes are, so far as I can discover, the only two classes of companies not incorporated, to which the act of Vict. can, by possibility, refer. I mean banking companies existing under the 7 Geo. 4, c. 46, and the subsequent extension of that act by the act passed in the year 1833, the 3 & 4 Will. 4, c. 98, and companies associated for trading or other purposes, having letters patent granted by the crown, but not incorporated. And it seems to me, if those were the only two classes, that either one or both of them must be the class or classes to which the act of Vict. refers. That the words, "public company not incorporated," would be applied, properly, to the last class, seems to me to admit of no doubt. The names of the members and of the officers who are to sue and be sued on behalf of the company, the objects of the society, and many other particulars relating to it, are to be enrolled, and thereby made public. Therefore, it seems to me to be impossible to doubt that such a company would be a public company not incorporated within the meaning of the act of Vict. Then the question is, whether there is any real distinction, whatever, between that which I assume must be taken to be a public company not incorpo-

rated within the meaning of the act of the 1 & 2 Vict., and a banking company acting under the law that was then in force, namely, the 7 Geo. 4, c. 46, and the 3 & 4 Will. 4, c. 98. I see no real distinction between the two. It is true that the banking company was not a banking company carrying on its operations under the provisions of a charter or letters patent not incorporating them; but all the attributes of publicity appear to me to exist as well in the one case as in the other. The names of the members are all enrolled, with their addresses, and every transfer of interest is enrolled; and the company is to sue and be sued by public officers just in the one case as in the other, and it seems to me that, in the absence of a legal definition, I must treat the one case to be just the same as the other; that that which was the attribute of publicity in a trading company *quasi* incorporated under the statute of the 7 Will. 4, and 1 Vict. c. 73, was the attribute of publicity in the case of a banking partnership. In my opinion the two cases are undistinguishable; and the one being, as I assume it must be taken to be, within the meaning of the act of the 1 & 2 Vict., the other must be taken to be so likewise.

It does not appear that in the case of banking companies it is at all necessary that their capital should be divided into shares, although with respect to companies *quasi* incorporated under the 7 Will. 4, and 1 Vict., it is necessary that their capital should be divided into shares, and should be transferable. But, in point of fact, the capital of the Union Bank of London is divided into shares. I do not, however, think I can hold the Union Bank of London to be a public company within the meaning of the 1 & 2 Vict., merely because its capital is divided into shares. In my opinion it would have been a public company if its capital had not been so divided; because the attributes of publicity would exist, namely, the return of the names and places of abode of the members from time to time, and of the officers appointed to sue and be sued on behalf of the company.

There was another ground that was relied upon as showing that this was a public company, which I confess I do not pay much attention to. It was this: that the Joint-stock Companies Registration Act, 7 & 8 Vict. c. 110, defines a joint-stock company to be a company, the shares in which are transferable without the express consent of all the members; and it was said that this company is a joint-stock company according to that definition; and so I think it is; but I do not rely upon that, I advert to it merely to show that the observation did not escape me.

Then, a minor objection that was raised was this: the statutes about bankers are confined to banking copartnerships carrying on their business in England; and it was said that, upon a demurrer, it must appear that this was a banking company carrying on its business in England, and that there is no averment in the bill to that effect. Now, that objection, I should be very much inclined to say, would be a good objection and would be fatal, if it were not discoverable, from the bill, that this banking company is carrying on its business in England. I do not allude to its being called the Union

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Bank of London. That does not necessarily import that it is carrying on its business in England; for there may be a bank in Glasgow or Dublin calling itself the Union Bank of London. But does it not appear clear that it is not only called the Union Bank of London, but that it carries on its business in England? I think it does, and for this reason: by the 47th section of the 7 & 8 Vict. c. 113, which is an Act to regulate Joint-stock Banks in England, it is provided that, after the passing of this act, every company of more than six persons established, on the 6th of May, 1844, for the purpose of carrying on the trade or business of bankers within the distance of sixty-five miles from London and not within the provisions of this act, shall have the same powers and privileges of suing and being sued in the name of any of the public officers of such copartnership as the nominal plaintiff, petitioner, or defendant on behalf of such copartnership, and that all judgments, decrees, and orders made and obtained in any suit, may be enforced in like manner as is provided with respect of such companies carrying on the said trade or business at any place in England exceeding the distance of sixty-five miles from London under the provisions of the 7 Geo. 4, c. 46, provided they make out and deliver, to the commissioners of stamps and taxes, the accounts and returns required by the last-mentioned act. And the bill contains this averment: That the Union Bank of London, immediately upon the passing of the act of the 7 & 8 Vict., intituled, "An Act to regulate Joint-stock Banks in England," that is to say, in the year 1844, availed itself of the provisions of that act, whereby it was provided, &c., referring to the clause in question. Now they could not avail themselves of the provisions of that act unless they were a banking company carrying on business within sixty-five miles of London; and, therefore, that objection cannot prevail.

I have now disposed of the demurrer on the record, so far as it is a demurrer for want of equity.

Then the demurrer goes on to allege, in substance, that William Sprott Boyd, who was one of the co-makers of the note, was a necessary party to the suit. I think that is wholly untenable; because, upon looking at the 32d general order of August, 1841, it seems as if it were made with reference to this very case. It says that where several persons are liable to the plaintiff, the plaintiff may proceed against one or more of them as he may think fit; therefore, that disposes of the only other ground of demurrer on the record.

March 4 and 5, 1851. The defendants assigned a third cause of demurrer *ore tenus*, which renders a further statement of the contents of the bill necessary.

The bill alleged that the Union Bank of London pretended that Connell, Webster and Mark Boyd were justly and truly, within the true intent and meaning of the provisions of the deed of settlement, respectively indebted to the bank, in sums of money exceeding the

values of their respective shares; and that, in respect of such debt, the bank was entitled to have a lien or charge on such shares respectively; but the plaintiffs charged the contrary thereof to be true, and that, although there was some debt due to the said company from Connell, Webster and Mark Boyd, yet the same was a debt due from all of them, and from a great number of other persons, shareholders in the bank, and others; and the banking company's debt was amply secured by the shares of such other persons, and by other securities for the same debt which the company held; and so it would appear if the defendants would set forth what the debt or debts was or were in respect of which the said company claimed such lien on the said shares respectively, and how and in what character, and under what circumstances the same was or were contracted; and, in particular, whether the same was or were due or alleged to be due from them, Connell, Webster and Mark Boyd respectively, individually, or from them as members of any firm, company or partnership, or jointly with any other individual or individuals; and how the said banking company alleged that the said lien arose or was created; and also what other persons or person the said banking company had liable to it for such debts or debt, and what securities or security, liens or lien, it held for the same.

And the bill prayed that the directors of the bank might be ordered to sell the shares of Connell, Webster and Mark Boyd in the bank, and to pay over the proceeds or so much as might be required, in or towards satisfaction of the debt due to the plaintiffs; and, if it should appear that the banking company had any lien or charge upon the said shares or any of them, prior to the plaintiffs' charge thereon, then that an account might be taken of what was so due to them; and that proper directions might be given for the satisfaction thereof out of the said shares, and out of or by means of the other securities held by them, or for enabling the plaintiffs to pay to the banking company the amount of such charge, and to have assigned to them thereupon, the said several securities held by the banking company for the same; and that proper directions might be given for marshalling the said securities, so as to give, to the plaintiffs, the benefit of their said charge upon the said shares.

The cause of demurrer assigned *ore tenus* was that the persons who were liable to the banking company, or had given securities to it for the debt due from Connell, Webster and Mark Boyd, were necessary parties, but were not made parties to the bill.

Mr. Bethell and *Mr. James* said that the demurrer *ore tenus* could not be sustained: First, because the bill alleged that the debt due to the bank from Connell, Webster and Mark Boyd was amply secured on other property than the shares of those defendants in the bank, and it merely sought to compel the banking company to have recourse to that other property for payment of the debt owing to them by Connell, Webster and Mark Boyd, and to leave untouched the bank shares of those defendants, which were the only property that the plaintiffs could have recourse to for payment of the debt due to them; *Aldrich v. Cooper*, 8 Ves. 382, 391, where Lord Eldon said, "But the

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court has said, and the principle is repeated, very distinctly, in *The Attorney General v. Tyndal*, that, if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds shall take to that which, paying him, will leave another fund for another creditor;" secondly, because the bill sought to discover who the persons alleged to be necessary parties were; and, therefore, it would be absurd to allow a demurrer because those persons were not made parties; and, thirdly, because Connell, the debtor, and not the bank, was the demurring party, and it did not lie in his mouth to make the objection for want of parties.

Mr. Stuart said that the bill did not allege that the plaintiffs did not know who the persons alleged to be necessary parties were; and that Connell was as much entitled, as the bank was, to make the objection for want of parties.

THE VICE CHANCELLOR. This objection for want of parties seemed to me at first to be a valid one; and the more I have considered it, the more weight it has seemed to have, and my final impression is that it must prevail. Three answers were given to it, two by *Mr. Bethell*, and one by *Mr. James*. *Mr. Bethell's* first answer was that the plaintiffs sought to take from the banking company only one of the funds on which the debt due to them from Connell, Webster and Mark Boyd was charged, they having other ample security for it. The plaintiffs, however, cannot touch any portion of the security until they have paid the debt. If the company held security to the amount of a million, the plaintiffs could not touch a farthing of it without satisfying the debt.

It seems to me, too, that the account prayed for cannot be taken in the absence of the persons who are alleged to be necessary parties. What is asked is, that if it shall appear that the banking company have any lien or charge upon the shares of Connell, Webster and Boyd, prior to the plaintiffs' charge thereon, then that an account may be taken of what is so due to them. I do not know why the bill says, "if it shall appear," because it alleges that they have a charge on the shares. And then it asks that proper directions may be given for the satisfaction thereof out of the said shares and out of or by means of the other securities held by them, or for enabling the plaintiffs to pay to the company the amount of such charge, and to have assigned to them, thereupon, the said several securities held by the said banking company for the same, and that proper directions may be given for marshalling the said securities, so as to give the plaintiffs the benefit of their charge upon the said shares. The bill, therefore, so far as it prays this relief, is a bill by a second incumbrancer to redeem the first (which he would have a right to do) and to have all the securities held by the first incumbrancer assigned to him. But that cannot be done without having the persons, who gave those securities, before the court.

I shall now advert to *Mr. James's* answer to the objection, which was that, as Connell was one of the debtors, he was not at liberty to make the objection. I think, however, that what *Mr. Stuart* said is quite correct; namely, that Connell and every other person who is

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interested in the account is at liberty to make the objection; because he, as well as they, has a right to have the account taken so that it may bind all parties, and conclude, forever, all matters arising out of it.

The only other point that remains to be considered is Mr. Bethell's second answer to the objection, which was that the bill contained a charge for the purpose of discovering who the persons alleged to be necessary parties are. I think that if the bill had alleged that the plaintiffs did not know who those persons were, the demurrer would not have held, but it makes no such suggestion; and therefore, the discovery is sought not to enable the plaintiffs to supply the defect of parties, but merely as ancillary to the relief; and the rule is, that if a plaintiff cannot have the relief, he cannot have the discovery.

It appears to me that none of the answers meet the objection, and consequently, that although the grounds of demurrer on the record are overruled, the ground alleged *ore tenus* must be allowed.

After the judgment had been pronounced, some discussion took place with regard to costs. The question was whether no costs were to be given on either side, or whether the plaintiffs were to be allowed the costs of the demurrer on the record.

Mr. Bethell referred to the *Attorney General v. Brown*, 1 Swanst. 265, see 288, and *Mortimer v. Fraser*, 2 Myl. & Cr. 173, and asked for leave to amend the bill by either adding parties to it or striking out of it the passages which made the adding of parties necessary.

Mr. Stuart referred to *Newton v. Lord Egmont*, 4 Sim. 547.

The VICE CHANCELLOR. I will consider this question, and give my opinion on it to-morrow morning.

The VICE CHANCELLOR. My first impression was that, in a case like the present, where the causes of the demurrer stated on the record are disallowed, but the cause alleged *ore tenus* is allowed, the practice was not to give costs to either party; and I still think that that is the more reasonable course of proceeding. But there is an order of Lord Clarendon's, made just after the restoration, in the following words: "If any case of demurrer shall arise and be insisted upon at the debate of the demurrer more than is particularly alleged, yet the defendant shall pay the ordinary costs of overruling a demurrer, which is hereby ordered to be five marks, if those causes which are particularly alleged be disallowed; though the bill, in respect of the particulars so newly alleged, shall be dismissed by the court."¹ And it appears, from the *Attorney General v. Brown* and *Mortimer v. Fraser*, that the practice has been according to that order; and therefore, I shall order the defendants to pay the costs of the demurrer on the record, as it is called, but make no order as to the costs of the demurrer *ore tenus*; and I shall give the plaintiffs leave to amend their bill, not generally, but by either adding parties, or making such alterations in it as may cure the defect of parties.

¹ This order is contained in Mr. Beames's Collection, p. 174.

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REEVES v. BAKER.¹

March 24 and 25, 1851.

Practice — Dismissal.

The executor of a deceased defendant cannot move that the plaintiff should revive the suit against him within a limited time, or that the bill should be dismissed, with costs, against such deceased defendant; and a motion by an executor for that purpose was refused, with costs.

THIS was a motion, on notice before decree, by the executor of the late Mrs. Lucy Bridger, deceased, one of the defendants, that the plaintiff should, within ten days from the date of the order to be made on the motion, file a bill of revivor or supplement against the executor, or that, in default thereof, the plaintiff's bill might stand dismissed as against the said late defendant Lucy Bridger, with costs.

Roundell Palmer, (with whom was *Cole*), for the motion, cited *Burnell v. The Duke of Wellington*, 6 Sim. 461.

W. W. Cooper, contra, contended that the application was unusual, and that there was no precedent for the order sought. The only authority on the subject was the case cited, which was made in the absence of the plaintiff, and in which no mention was made of the costs. That even if that case could be considered as an authority for an order that the plaintiff should revive within a limited time, or in default that the suit might be dismissed, it clearly was no authority for an order, in the terms of the notice, that the bill should stand dismissed, *with costs*. The 63d order of May, 1845, provided for the case of a sole plaintiff dying, and enabling a defendant to compel his legal representative to revive, but did not provide for a case like the present. [He cited *Smith's Hand Book of Ch. Prac.* 259.]

Roundell Palmer, in reply, contended that the order to revive, or that the suit be dismissed, was one of course; 1 Dan. Ch. Prac. 787; and that the court, having jurisdiction to make such an order, clearly had power to deal with the costs.

LORD LANGDALE, M. R. I do not at present see why an executor of a deceased defendant should not be allowed to compel the plaintiff to revive the suit. It would be a great hardship for an executor to be obliged to stand by for any length of time with a bill of revivor impending over him. However, as there seems to be some doubt on the practice, I will cause inquiries to be made, and state my opinion to-morrow.

March 25, 1851. LORD LANGDALE, M. R. I have caused inquiries to be made as to the practice in this matter, and am disappointed

¹ 15 Jur. 387.

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in finding it to be that the plaintiff has an option to revive or not, and the executor of a deceased defendant has no means of compelling him to revive. I therefore, with regret, must decline to make any order on the motion.

THE ATTORNEY GENERAL v. THE GREAT NORTHERN RAILWAY COMPANY.¹

November 4, 5, 12, and 13, 1850.

Railway Company — Injunction — Sequestration.

During the construction of a railway an injunction was granted against the company, restraining them from further interfering with a particular road, and from so constructing their works as to obstruct, impede, or render less secure the same road, or so as to hinder or prevent the passage of carriages along the same. The company then laid their permanent rails over the road on a level, and, by the direction of the commissioners of railways, erected gates across the road, for security of passengers, and, with the sanction of the same commissioners, opened the line for public traffic; whereupon the court ordered a sequestration to issue for breach of the injunction, and refused to suspend the issuing of process until an appeal against the order could be heard.

THIS was an information filed by the attorney general, at the relation of Mr. Chapman,² for an injunction to restrain the company from interfering with a public road. The order for the injunction was made on the 2d May, 1850, and it restrained the company, their agents, workmen, and servants, from further interfering with the turnpike road leading from the entrance of the London road, at the south-eastern side of the town of Biggleswade, along a road called Crab Lane, to the end of Sun Street, in the same town, being part of the high road from London to York, and from constructing the works of the Great Northern Railway, whereby the same road should be obstructed, impeded, or rendered less secure or safe for the passing and repassing of carriages and passengers thereon than the same was when first interfered with by the company, or whereby carriages or passengers should be hindered or prevented from passing and repassing in the same way as they had been able to do theretofore. The company, since the issuing of this order, had laid their permanent rails over the road in question on a level, had erected gates, and opened the line for public traffic.

Bacon and Hamilton Humphreys now moved for a sequestration against the company for a breach of the injunction.

Wigram, Malins, and Denison, for the company, opposed the motion. They argued that, in fact, there had been no breach of the injunction. They had applied to the railway commissioners for their certificate, as required by the act of Parliament, and in the mean time

¹ 15 Jur. 387.

² See the case reported on the motion for the injunction, 14 Jur. 684.

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they had taken all the precautions in their power to prevent accident or damage by reason of the railway crossing the road on a level. Gates had been erected, and every other proper means adopted, to comply with the spirit of the order for the injunction. That order was made to prevent the road being made impassable or dangerous, and the passage of the public and the safety of the public had both been secured, and that was sufficient proof that no actual breach of the injunction had been committed. The gates had been so erected pursuant to the orders of the railway commissioners, who were by the law the competent judges of what was necessary for the safety of the public in such cases. The concurrence of those functionaries had been thus obtained, and the relator seemed to be one of the very few persons who complained, and no one was injured in any manner. The other points relied on, on behalf of the company, are fully referred to and commented on in the judgment.

November 12, 1850. KNIGHT BRUCE, V. C. The motion, on the part of the informant and plaintiff, which I have to dispose of in the present case, was made on two notices, one dated the 31st July last, and the other dated the 29th October following, and asked that a sequestration might issue against the company, on the ground of alleged contempt. The first question raised by it is, whether a breach of the injunction granted in the cause in May last has been wilfully committed by them; as to which it may be at once stated to be perfectly clear, that, if the injunction has been broken by them, it has been broken wilfully, that is to say, with direct and full notice of it, and in disregard — perhaps it might be said in defiance — of the plaintiff's warnings and remonstrances. That, both on the 29th October and on the 31st July last, the company, by their agents or servants, were obstructing or impeding the turnpike road, called Crab Lane, and, if not rendering it less secure or safe for the passing and repassing of carriages and passengers on it than it was when first interfered with by the company, were at least hindering or preventing carriages or passengers from passing and repassing in the same manner as they had theretofore been able to pass and repass, is a matter free from doubt, and a continuance of the same course ever since may be inferred.

But, nevertheless, the defendants have contended that the injunction has not been broken; their grounds for that contention being, that, as they say, the injunction was not mandatory, as distinguished from what was merely prohibitory; that their rails, laid, in fact, on the turnpike road in question, and crossing it, were so laid and did cross it when the injunction was granted, and before that, whatever might be the state of things when notice of the motion, on which the injunction was granted, was given; and that the actual interference and intended dealing with the turnpike road, which the information and bill attribute to the company, are different in purpose, different in object, different in manner, from any actual or intended dealing with it which the informant and plaintiff alleges to be in breach of the injunction. The defendants rely also on certain proceedings by and before the railway commissioners, who are represented to have

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directed or sanctioned the erection of certain gates complained of, which gates, it has been said, are essential or material for the protection of the lives and limbs of men and cattle, as the railway in its actual state, whether by right or wrong, crosses the turnpike road on a level. Whether the injunction, in substance and effect, contained any thing mandatory, as distinguished from what was prohibitory, I do not think it necessary to decide, and I decline stating any opinion; nor need I say whether the informant and plaintiff is entitled on this motion to refer to the state of things which existed when the notice of motion was given upon which the injunction was granted, as distinguished from the state of things existing when it was actually granted; for when it was granted, the rails were, as I understand the facts, used only for purposes connected with the construction of the railway, and not for the conveyance of passengers or goods—not for what in the language of the business is called “traffic;” but the railway having been open for public use in August of the present year, the company have since employed the rails in question for purposes exceeding, and in a sense differing from, those for which they previously employed them; and it is, I think, clear that obstruction or impediment to the free use of the turnpike road is thus caused to a greater extent—an extent materially greater—than at the time of granting the injunction, and in a sense differently, and this independently of the gates, that is to say, as the case would be even if those gates were removed. But the gates, however necessary or valuable they may be—and very likely they are—for the purpose of protecting life and limb against the proceedings and conduct of the company and their agents, do, as it appears to me, in the sense in which plainly the words “obstructed,” “impeded,” and “hindered” are used in the injunction, obstruct the turnpike road in question; do create, in the clearest and most direct manner, such an impediment and hinderance as the injunction, whichever way considered, has plainly forbidden; and those gates at least are certainly within the cognizance of the court on the present occasion, and would be so were the motion of the 29th of October out of the case. If it be said, as it has been, that the effect of removing the gates would be to create a state of general danger, the answer is, that the railway ought to be stopped, inasmuch as it is passing illegally across a road, the right over which it is the office of this suit to protect.

With respect to the argument grounded on the language of the information and bill, it may possibly, though it does not, in my opinion, furnish a reason for varying the injunction; but upon the question, whether the injunction has been broken, it seems to me to have no place. The injunction prohibited, not merely obstruction of any particular kind—not obstruction with any particular object merely—but obstruction and impediment. A man has a right of way, his neighbor obstructs it wrongfully, and this for a purpose declared, and in a particular manner, the purpose and manner being, as to the person entitled to the right of way, of secondary or immaterial consideration, the mere obstruction being that about which he cares and is concerned, not because it is with this view or that, or in

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one form or another, but because it is an obstruction. Thereupon he obtains an injunction, not against an obstruction actuated or shaped thus or thus, but against obstruction. Upon this the aggressor, finding it convenient to interfere illegally with the right of way for some other purposes, to obstruct it wrongfully for some other object, and to create a wrongful obstruction in a new shape, does it, and then insists that, by the change of shape and purpose, he is clear of the injunction. This is an attempted view of the law, which is not wholly perhaps new, but, whether new or old, is one which I must decline adopting.

With respect to the railway commissioners, I assume that they sanctioned the opening of the railway in August for public use, and did so upon the condition that the defendants should erect the gates already mentioned. But if the commissioners could, by any order or act of theirs, have rendered the defendants' present use of the turnpike road, or mode of dealing with it, lawful against the rights and interests which it is the object of this suit to protect, they have not been proved to have done so, or to have professed or intended to do so. My impression is, that the case before me is not in the least degree affected by any thing that they appear to have done. Giving no opinion, therefore, as to the extent of their powers, I think that the part of the case concerning them may be dismissed from consideration. It appears plain to me, that the company have broken the injunction in letter and in spirit, that they had done so contemptuously, and that they must be taken as still pursuing the same course.

Then comes the question, what, if any thing, the court ought to do in consequence; because it does not necessarily follow that the process asked must issue. It is upon the defendants, however, to make a case to exempt them from it; and perhaps, if they had shown their proceedings not to be plainly and clearly illegal — I mean illegal independently of any question of contempt — or had satisfied the court that the injunction ought not to have been granted at all, or ought to be dissolved, discharged, or put into a shape more favorable to them than it is; or had stated that they had appealed from it, or from the order granting it, or intended to do so, I might have declined or delayed allowing the process to go. But none of these things have they done. On the contrary, my belief is strengthened of the utter impropriety, without any reference to the injunction or this suit, of the acts alleged to be also a contempt of this court. My opinion is more fixed, that the injunction, instead of going too far, does not go far enough, and that it is one of which the company cannot justly complain. Considering their conduct to be at once contemptuous and otherwise illegal; to be wrongful as against the plaintiff individually, wrongful as against her majesty's subjects at large, and, indeed, a bad — I had almost said a scandalous — example; whatever amount of inconvenience may result from acting against the company on this occasion, I think it right to deal with them according to their merits. The consequence may possibly be to stop the railway. I answer again that it ought to be stopped, for

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it passes where it does by wrong. The directors of the company, their agents and servants, cannot, on this motion, be committed to prison; but what can be done shall by me be done to repress this daring invasion of public and private rights — an invasion maintained moreover in open defiance of all law, authority, and order. Let a sequestration issue.

November 13, 1850. *Wigram, Malins, and Denison* this day moved, on behalf of the company, that the proceedings under the order for a sequestration might be suspended until the appeal from such order had been heard before the lord chancellor. Notice of the appeal had been given. The ground of the application was the very great inconvenience to which the public might be subjected by the issue of the process, and after all the court of appeal might take a different view of the facts, and decline to decide that there had been a breach of the injunction.

Walker, Bacon, and Hamilton Humphreys appeared for the informant and plaintiff, but were not called on. They, however, in answer to a question put by the court, consented that no process should be issued for ten days.

KNIGHT BRUCE, V. C. The injunction in question was granted, after argument, in May last, and has never been sought to be discharged or varied until after the making of an order in November for process of contempt, in consequence of a breach of that injunction. I have not heard any arguments that incline me, as far as my judgment is concerned, to doubt the propriety of that injunction. The real question appears to me to be one to which I address myself in disposing of the matter as to the breach of the injunction; and the argument to which I have adverted was this: a right of way was the subject of wrongful interference and unlawful obstruction, and thereupon a court of equity interfered by injunction to restrain obstruction, not obstruction of any particular kind, for that would make aggression and litigation endless, but obstruction; upon this the aggressor changed his course, and addressed himself to an obstruction equally wrong, equally lawless, and said that he was entitled to do what he had done, and that the injunction ought to be varied, in order to be placed in a shape which should protect the plaintiff only from one mode of obstruction, leaving the defendants at liberty to exercise an endless variety of oppression. To that argument I decline to accede. I am of opinion that the injunction has most plainly been broken. I have heard every thing that ability could urge, I believe, in support of the present motion for delaying the issue of the process of sequestration. I have heard nothing in favor of it. If it is done, it must be done by some other jurisdiction than mine. I think this a case in which not merely the public interest, represented by the attorney general on this record, not merely the private interest of the plaintiff, but the interests of all the queen's subjects at large, are concerned. It is a matter in which, in my opinion, the open course of

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justice is defined. There is no reason for the court's interference, in my judgment, whatever may be the amount of inconvenience sustained by the company. As the informant and plaintiff is willing to undertake that the process shall not be executed for ten days, I shall refuse this motion, with costs.

RICHARDSON v. GILBERT.¹

April 15 and 16, 1851.

Copyright — Review — Payment.

Semble, that where the proprietors of a review employ persons to write in the review, the articles written must be paid for, in order to vest the copyright in the proprietors, under stat. 5 & 6 Vict. c. 45.

THE bill in this case was filed by Thomas Richardson and Joseph Sandford Richardson. It stated that the plaintiffs were the sole printers and publishers of a periodical work called "The Dublin Review," which was published in quarterly numbers, and consisted of original compositions or articles; that all the original articles which had been published in the said work during some years past, and up to the present time, including the tenth article in the fifty-eighth number, have been composed for and for the use of the plaintiffs by persons employed by the plaintiffs to compose the same, on the terms that the copyright and property therein should belong exclusively to the plaintiffs, and should be paid for by the plaintiffs; that they had duly caused an entry of the said publication to be made at Stationers' Hall; that under the circumstances aforesaid the plaintiffs were entitled to the exclusive property and copyright of and in all the said original articles so printed and published by them as aforesaid, and in particular of and in the said tenth article of the fifty-eighth number called "The Hierarchy," and are entitled to the sole and exclusive liberty of printing, publishing, and selling the said articles, by force of and under, and subject to, the provisions of stat. 5 & 6 Vict. c. 45, entitled "An Act to amend the law of copyright;" that the defendant, James Gilbert, had published a printed pamphlet, called "The Roman Catholic Question," and containing, amongst other things, a copy of the said tenth article. And the bill prayed an account of the profits made by the defendant, and that the defendant might be restrained from publishing any copies of the publication containing the said copy of the said tenth article. The plaintiffs filed an affidavit, following the words of the bill, and obtained an *ex parte* injunction. The defendant by his answer stated, that for some time in the year 1845, Mr. Dolman was the publisher of the Dublin Review, but was not the proprietor thereof, such proprietorship being vested in the Rev. Nicholas Wiseman, commonly called Cardinal Wiseman; that in the said year some differences arose between the proprietors of the said

¹ 15 Jur. 389.

Review and Mr. Dolman, and that the proprietors of the Review ultimately agreed with the plaintiffs that the plaintiffs should become the publishers of the said Review, but, as the defendant believed, the said Nicholas Wiseman and the superiors of Maynooth College, or some of them, continued and still continue to be the proprietors of the said Review; and the defendant, to the best of his belief, denied it to be true that the said plaintiffs were the proprietors of the said Review; that the defendant was not aware of the terms upon which the said articles, or any of them, had been composed; and that it was not even alleged by the said bill that the said tenth article was actually paid for by the said plaintiffs; so that the said bill, on the face thereof, did not show or allege a title in the said plaintiffs for the property in the said article. The defendant denied that the plaintiffs were entitled to the exclusive property in the said article, and said, that according to the statements in the said bill, it would appear, as the defendant believed the fact to be, that the copyright in such article, which, as the defendant believed, was composed and written by the said Cardinal Wiseman, was the property of the said cardinal, as the author thereof. The defendant now moved to dissolve the injunction.

Sir W. P. Wood, S. G., and Renshaw, in support of the motion. The allegations of title in this bill are imperfect. In order that the plaintiffs may have a title under the Copyright Act, 5 & 6 Vict. c. 45, s. 18, it is absolutely necessary that the work should have been paid for, and there is no allegation that such is the case. *Browne v. Cook*, 11 Jur. 77. By sect. 18 it is enacted, "that where any publisher or any other person shall, before or at the time of the passing of this act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed, under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this act, except only that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this act. Provided"

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always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns. Provided also, that nothing herein contained shall alter or affect the right of any person, who shall have been or shall be so employed as aforesaid, to publish as aforesaid any such his composition in a separate form, who, by any contract, express or implied, may have reserved or may hereafter reserve to himself such right, but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition, when published in a separate form, according to this act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid." The legislature only meant to give this privilege to publishers when the work has been paid for; that is a statutory mode of transferring the property, which must be followed, otherwise it remains in the author. Unless it is transferred in this manner, it requires a deed attested by two witnesses.

[*Lord Cranworth*, V. C. The question is, whether actual payment is a condition precedent to the title. Suppose the editor employs another to write, and pays him a salary per quarter, and has not paid him his quarter's salary, because it is not yet due?]

Then the copyright is in the author until it is paid. The court will not interfere unless the plaintiffs' right is clear. *Spottiswoode v. Clarke*, 2 Ph. 154. *Prince Albert v. Strange*, 1 Mac. & G. 25; 13 Jur. 45, 109. Here the defendant denies the plaintiffs' title.

J. Parker and Bagshawe, in support of the injunction. The answer does not say that we have not paid for the article, and has raised no question to throw a doubt over the equity. The allegations of the bill make out a *prima facie* title that is not displaced by the answer. Besides, the construction put on the statute by the other side is absurd. Suppose a present of books or other valuable consideration, would that not be sufficient to vest the copyright in the publisher? The contract to pay is the essential part. In *Browne v. Cook* some writers were paid and some were not, and it was impossible for the plaintiff to show that they had been employed, as required by the statute.

The *Solicitor General*, in reply. The legislature has provided that the copyright shall not pass till the money is in the author's pocket. The author may have fettered himself by an agreement, and may have deprived himself of the benefit of his works, but has not lost the copyright at law. The statute was intended to be beneficial to authors, and this may be a means of compelling payment to them.

LORD CRANWORTH, V. C. The bill alleges that the plaintiffs have the copyright in the whole of the articles, under the provisions of the act. The defendant says, that under the provisions of the act it is necessary that there should be an averment of actual payment. The statements in the bill are a *prima facie* averment of title, and the

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defendant does not swear that the plaintiffs have not paid. The plaintiffs say, first of all, that they caused an entry to be made, and that, under the circumstances aforesaid, they became and are now entitled to the exclusive property and copyright, &c. That is an averment that they have done all that the act of Parliament requires. At all events, as a case *strictissimi juris*, it must be taken as sufficient, when you do not say that they have not paid. It may be that the legislature intended payment to precede; but I must look at the act, and deliver my judgment to-morrow.

April 16, 1851. LORD CRANWORTH, V. C. I am of opinion that the plaintiffs' title does sufficiently appear upon the bill and the affidavits. Having said that, I must recall part of what I said yesterday; for, having looked at the act of Parliament, I am inclined to think that the solicitor general's gloss upon it was correct, and that actual payment is a necessary condition. I think it might have been so intended by the legislature; at all events, that is the construction I must put upon the act. Then have the bill and affidavits sufficiently stated a purchase, taking that to be the law? In the first place, it is a strong inducement to suppose that it is paid from what is stated—"That all original compositions or articles which had been published had been composed for and for the use of the plaintiffs by persons employed by the plaintiffs to compose the same, on the terms that the copyright and property therein should belong exclusively to the plaintiffs, and should be paid for by the plaintiffs." So far was an advance towards a good title; but it was said that the act does not give the plaintiffs a title unless the composition had been actually paid for.

The bill, however, goes on to state that they continued to be the publishers, and that the copyright was exclusively the property of the plaintiffs. It was sworn that it was an article they had employed a person to write, on the supposition that he was to be paid for it; and the affidavits state that it was his exclusive property. All that is said on the other side is, that the bill does not state that it was paid for. I am aware that the answer denies the title of the plaintiffs, but that is on a different ground.

Motion refused.

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JOHNS v. MASON.¹

April 28 and 30, 1851.

Orders of April, 1850 — Claim — Case upon Claim must be established in the ordinary Way, secundum Allegata et Probata — The Allegations of the Claim must raise the Issue.

The plaintiffs filed their claims, stating that the defendant had purchased wools of their agent for 180*l.*; that the defendant gave a check for the amount to the agent, by whom it was enclosed in a letter, and posted for the plaintiffs; that the letter never came to hand, nor had the check been received by the plaintiffs, or presented at the bankers' — in fact, that it was lost; that, except by the delivery of the check to the plaintiffs' agent, no payment had been made by the defendant for the wools, and that the defendant still remained indebted to the plaintiffs in the price thereof, but that, having given the check, the defendant could not be sued for the debt in a court of law. The claim asked for payment of the purchase money, upon an indemnity against payment of the check being given to the defendant by the plaintiffs. The plaintiffs, at the hearing of the claim, adduced evidence for the purpose of proving the agency and the loss of the check; and they endeavored to establish a case, in the event of the agency not being proved, that on the check being posted they acquired a property therein as owners, whereby, independently of the agency, they became entitled, as the check was lost, to sue in this court for the debt; and they further set up a promise to give them a fresh check, alleged to have been made to them by the defendant in a letter. The defendant denied the agency, and resisted a decree being made on the claim, on the ground of want of privity of contract. The court dismissed the claim, holding, first, that the case stated on the face of the claim was not proved by the evidence; secondly, that the claim of property in the check, independently of the question of agency, was not sufficiently put in issue by the allegations of the claim; and, thirdly, that there was no consideration shown for the promise in the letter.

The orders of April, 1850, authorising proceedings in this court by claim, are not intended to alter or affect the ordinary rule of the court, which requires parties, in establishing their case, to proceed *secundum allegata et probata*.

THIS was a claim filed to recover 180*l.* The claim stated that the defendant, in the month of January, 1848, purchased from one Sherwood, the agent of the plaintiffs, a quantity of wool for the sum of 180*l.*; that the said wool was delivered to the defendant, and that thereupon the defendant signed and gave to Sherwood a written check upon his bankers, payable to bearer, for the sum of 180*l.*; that the said check for 180*l.* was, on the 29th of January, 1848, enclosed by Sherwood in a letter written by him, and addressed and sent by the post to Mr. Holt, of Chelmsford, on behalf of the plaintiffs, whose general agent Holt was, but that such letter never reached Holt, and that the check had never been received either by Holt or by the plaintiffs, or either of them, or by any person on their behalf; and that it had never been presented to the said bankers for payment, and that the same had been lost; that, except by the delivery of the said check, the defendant never paid for the wool so sold and delivered to him, and that he still was justly indebted to the plaintiffs in the said sum of 180*l.*, the price of the wools, but that, in consequence of such check having been given by him, he could not be sued for the same in a court of law. The plaintiffs therefore claimed to be paid the said sum of 180*l.*, with the costs of the suit, they being ready, and thereby offering, upon payment of the said sum, to give the defendant their

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bond, or other security, as the court should direct, to indemnify the defendant against payment of the check. The evidence brought forward by the plaintiffs, in the first instance, was the following: An affidavit of one Whittaker, proving service of a notice by the plaintiffs upon the defendant in February, 1848, calling upon him to give a fresh check in lieu of the lost one, and offering, on his doing so, to indemnify him against any demand in respect of the lost check. An affidavit of one Thomson, proving that, on inquiry at the bank on which the check was drawn, he had been informed by the manager that the check had been neither presented nor paid. The affidavit of Holt, proving that, at the end of January, 1849, he was informed that a check had been sent to him in a letter, dated the 29th of January, 1847, by Sherwood, as agent of the plaintiffs, for goods sold and delivered to the defendant; that he never received such check; and that he subsequently, on behalf of the plaintiffs, applied to the defendant to send another, and that in reply he received a letter in the following terms:—

“Cliff Mill, February 9, 1848.

“Mr. Holt,—Sir: I am sorry you have not received the check of January 29th, for 180*l.*, which I gave Mr. Sherwood on that day to remit you, and am sure was sent you by that night's post. There is a possibility of the check turning up yet, and Messrs. Johns had better wait, say three weeks or so; and if the check does not come to hand in that time, if Messrs. Johns will indemnify me if I give them a check for the amount, as I shall require this, because I must not have the risk of the first check being presented, I shall have no objection to do so. You had better let the thing rest until that time, during which time every inquiry shall be made to recover the missing check, as I am sure Mr. Sherwood sent the check, as I have before stated, and your coming over in this way is only adding expenses, which had better be avoided, for his sake. If you receive the letter with check, send me a few lines to that effect.

“I remain, &c.,

H. MASON.”

Holt, by his affidavit, then stated that the defendant afterwards refused to send another check for 180*l.*, and that he, Holt, had never received the same or any part thereof. The plaintiffs, however, did not bring forward any affidavit of Sherwood in support of their case, nor did they prove the letter from Sherwood to Holt, in which the check was alleged to have been enclosed. The defendant then brought forward affidavits in answer. His own affidavit contained a statement of the dealings between himself and Sherwood, which took place in 1847. It stated that an account of such dealings was drawn up, dated the 4th of October, 1847, which showed a balance due to Sherwood of 6*l.* 16*s.*; that the defendant paid this balance on the 5th of November following to Sherwood, and that thereupon Sherwood wrote the following memorandum at the foot of the account: “Nov. 5, 1847, T. Sherwood;” and thereby acknowledged that all accounts in respect of the said dealings and transactions were finally settled and closed. The affidavit stated, that at the time of the dealings and

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transactions in question the defendant did not know, and had never been informed, and had no reason to suppose or believe, and did not suppose or believe, that Sherwood was acting as agent or on behalf of the plaintiffs or of any other person; but that, on the contrary, Sherwood represented himself to be, and the defendant believed that he was, acting on his own account solely and exclusively. The affidavit then stated that the defendant never afterwards purchased any goods whatever of Sherwood nor of the plaintiffs; but it stated that afterwards, in December, 1847, or January, 1848, the defendant was for the first time told by Sherwood, that part of the wool purchased of him belonged to the plaintiffs, and that on the 29th of January, 1848, Sherwood told him that he owed the plaintiffs 180*l.*, and pressed him for a loan of that sum; that he, the defendant, accordingly drew and delivered to Sherwood a check on the Yorkshire Banking Company, payable to Sherwood or bearer, Sherwood giving him security for the amount of the check, in the shape of an assignment of the proceeds of sale of real estates alleged by Sherwood to be coming to him; that Sherwood afterwards told him he had forwarded the check by post to the plaintiffs. The affidavit then stated that some correspondence afterwards ensued between the defendant and the plaintiffs, in the course of which he, the defendant, discovered that the security given to him by Sherwood could not be relied on, and that he therefore determined not to give a new check for the benefit of Sherwood, or on his account.

The affidavit then stated that he, the defendant, never was indebted to the plaintiffs at all in respect of the matters mentioned in the claim; that he was advised that he was still liable upon the check, and the defendant then insisted that the plaintiffs' remedy, if any, was to be sought for in a court of law, and not in a court of equity. The defendant brought forward one other affidavit only, by which the handwriting of Sherwood in the memorandum at the foot of the account of October, 1847, was proved. The defendant had not proved the payment of the balance, 6*l.* 16*s.*, nor did he produce the letter from Holt, to which the letter of the 9th of February, 1848, was an answer. No evidence was tendered by the defendant of the security alleged to have been given him by Sherwood. The plaintiffs then filed further affidavits in reply, in which they deposed that they were ignorant of the dealings between Sherwood and the defendant, and of the account mentioned in the defendant's affidavit. They deposed to having sent the wools to Sherwood, in August and September, 1847, to sell the same as their agent, and that they did not receive his account until the end of January, 1848, when he sent them the particulars of sale, with an intimation that the check for 180*l.* had been sent by post; and they fixed on the sums of 117*l.* and 63*l.* 15*s.* appearing in the account sent, as the sums for which the wools sent by them to Sherwood, as their agent, had been sold to the defendant. That account is dated the 5th of November, 1847, and they state that it did not contain any general statement of account, nor show that any money was paid to Sherwood by the defendant, nor that the defendant did not, as they believed, set off the money due to the plaintiffs for the

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wools against some alleged old claim of his own against Sherwood. They deposed that they never heard, till after their claim in the cause was filed, that the defendant had any claim against Sherwood; that in the correspondence between them and the defendant with regard to the check, and the loss thereof, and the defendant's promise to give a new one, or in any other correspondence, the defendant never informed them that he had advanced to Sherwood such check as an accommodation to him, upon the faith of any security whatever being given by Sherwood to the defendant; nor that he had discovered that no reliance could be placed on such security; nor that in consequence thereof he had determined not to give any new check; but that, on the contrary, he expressly promised, in his letters, that if the plaintiffs would wait a reasonable time, and the check should not be found, the defendant would, on the receipt of an indemnity, give them a fresh one for the same amount. By a further affidavit the defendant verified two letters written by him to the plaintiffs. The first of these letters was dated the 3d of March, 1848, and was as follows:—

“Messrs. Johns:—

“Cliff Mill, Great Horton, March 3, 1848.

“Gentlemen,—In reply to your letter of this morning, you are aware that I have paid for the wool to Mr. Sherwood, and you wish me to remit you the money, which I cannot do. I gave Mr. Sherwood a check for 180*l*, which has not turned up yet; you cannot expect me giving you another. If you were the payer, and in my situation, you would not like the responsibility of having two checks out for one payment. I saw Mr. Sherwood a few days since. Perhaps you are not aware that Mr. Sherwood will have some property, which I know during the last week he has been trying to sell, to provide for the check, and to enable him to carry on his business. It is in Leicestershire, and I have seen the deeds myself; that you may rest assured that he can and will—that is, if you will give him a little time—provide for the check himself, he being the proper person to do so. He told me, when I saw him, that he had got the promise of an advance upon the property at Lady day, if it could not be disposed of before. The property is by his wife's relations. That, were you to cause him unpleasantness, it might be longer before you got your money, and delay him getting it. This is what I should advise you, as I think it will be for the best.

“I remain, gentlemen, yours,

“HENRY MASON.”

The second of these letters was as follows:—

“Messrs. Johns:—

“Cliff Mill, Great Horton, March 10, 1848

“Gentlemen,—Your letter to hand, and in reply, beg to refer you to my former letter. I saw my banker, and he thinks it still probable the check I gave may yet turn up; and, on this account, as I before stated, I think it better you should give Sherwood the short time he requires, that is, a few days after Lady day, he being the responsible party; and he seems to have no doubt but that he can provide you the

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amount then. The time being so very short, — the end of March, — you had better wait, as I think you will get the money then.

"I remain, gentlemen, yours,

"HENRY MASON."

The plaintiffs, however, had not produced the account of sales of their wool, sent by Sherwood to them, in January, 1848. The defendant afterwards filed a further affidavit, in which he enumerated his own dealings with Sherwood. He also set forth certain invoices of goods, sold and delivered to him by Sherwood. The invoice stated the produce of the wool to be 117*l*. In this state of the evidence the cause came on for hearing.

Roll and Bigg, in support of the claim. The evidence shows that the check for 180*l*. was given by the defendant to Sherwood, as agent of the plaintiffs, in payment for the wools, and that the check has since been lost. In that state of things, a bill in equity, with an offer of indemnity, will lie against the drawer for the amount for which the check was given. *Macartney v. Graham*, 2 Sim. 285. The defence set up by the defendant, namely, that he dealt with Sherwood as principal, and not as agent, and that the check was given by way of loan to Sherwood, is inconsistent with what is said by him in the letters of the 9th of February, and of the 3d and 10th of March. Those letters, taken together, amount, it is submitted, to a clear admission of agency on the part of Sherwood, for the plaintiffs, and that the check was given for the wools. No reference is made therein either to the defence set up or to the loan, nor is any evidence offered of the security alleged to have been given. Admitting, however, for the sake of the argument, that Sherwood was acting as principal, still the evidence shows that, being indebted in 180*l*. to the plaintiffs, he enclosed the check in a letter addressed to Holt, the plaintiffs' agent, which he posted. This, in law, is tantamount to a delivery of the check to the plaintiffs, who thereupon became the legal owners thereof. After delivery at the post-office the check is at the risk of the creditor, and if it is lost, the debtor is discharged at law. *Warwicke v. Noakes*, 1 Peake, 98. *Hawkins v. Rutt*, Id. 248. Where the letter is properly directed to the creditor, or his agent, proof that it was put into the post-office is equivalent to proof of delivery to the creditor. Ry. & M. 149. The plaintiffs thus became owners of the check, and received it as a payment for wools sent to Sherwood, whether it was given by the defendant for their wools or not. Being, in either case, the owners of the check, but having lost it, they are unable to proceed for their debt at law. Production of the check is essential. To an action for the recovery of the debt, it would be a good plea that a promissory note had been taken in payment, and was not produced. During the currency of the security, the original remedy is held at law to be suspended, or in abeyance. Chitty on Contracts, 767. The only remedy is by bill here, upon an offer of indemnity; Chitty on Bills, 264; and as to this, there is no distinction between a check and a promissory note or bill. The offer to give a fresh check, contained in the letter of

February, is in effect a promise in consideration of an antecedent debt, to the performance of which the plaintiffs, independently of other considerations, are entitled.

The *Solicitor General* and *Elmsley*, for the defendant. The letters of February and March are the only evidence offered by the plaintiffs of the defendant being in their debt for the wools. The letters of March are quite consistent with the arrangement between the defendant and Sherwood mentioned in the defendant's evidence. Holt in his letter says he was informed that a check had been sent by Sherwood to him by letter. Sherwood, however, has not been examined, nor are his letters to Holt and the plaintiffs proved. The whole evidence in support of the plaintiff's case, so far as it depends on the agency of Sherwood, and on the defendant being indebted to them, is furnished by the letter on the 9th of February. That letter, however, does not refer either to the wool, or the debt, or to the agency; there is no proof in it upon either of those subjects; but that is the whole of the plaintiffs' evidence. On the other hand, the defendant denies any notice of the agency, and he denies the debt; and in support of his denial he proves a settled account, including the transaction in wools with Sherwood as principal, and payment of the balance. It is submitted, therefore, that the agency of Sherwood has not been proved, and that there is no privity of contract between the plaintiffs and the defendant. Next, as to the ownership of the check. It is submitted that the cases cited have no application to the present case. In *Warwicke v. Noakes* there was an express authority to send the bill by letter. *Hawkins v. Rutt* was a question of service of a notice, and must be taken in connection with the subject matter of the proceeding before the court. There is nothing in those cases to show that the check, on being posted, became the plaintiffs' property. Admitting, however, that it did, can it be contended that the amount for which it was given passed by the delivery of the check, so as to enable the plaintiffs to sue? If the check were lost, no doubt it might be sued upon by an innocent holder. If that be so, how could the plaintiffs acquire a right to sue on the check being left at the post-office? How could two parties be entitled to sue in respect of the same debt? It is submitted, moreover, that the posting of the check has not been established in evidence. The only proof offered is the statement in Holt's letter, that he had been informed by Sherwood it had been posted. This requires corroboration by Sherwood, who, however, has not been examined, nor is his letter to Holt produced. The evidence is insufficient. Why, then, is the defendant to be called upon to give another check, and so have two checks out for the same payment? The claim of the plaintiffs, if any, is rather for the consideration of a court of law than of this court. No authority has been produced to show that, if a check be given for a debt, and be not paid, no action could be brought for the debt. The cases cited were cases in which bills of exchange or notes had been taken in payment. Those were cases of contract to take the securities in payment. In such case it is part of the contract that no action can

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be maintained while the securities are running. There is no such contract, however, in the case of a check given payable to bearer. *Prima facie*, the check is not payment. There might be no assets of the drawer at the bank drawn upon. To an action for the money, delivery of the check in payment would be no defence. Payment of the check, or its existence as a security on which the defendant remains liable, must also be proved. Supposing, therefore, which is not the case, that agency on the part of Sherwood were proved, still there is no reason why the plaintiffs could not bring an action at law for goods sold and delivered. With regard to the promise contained in the letter of February to give a new check, it is submitted that such promise is a nude pact, and without consideration, no antecedent debt due from the defendant to the plaintiffs being proved.

Roll, in reply.

April 30, 1851. SIR GEORGE TURNER, V. C., after recapitulating the statements of the claim, and the effect of the evidence on both sides as stated above, said he had been asked to make a decree for payment of the wool on three grounds: first, that the plaintiffs had established that the check had been given by the defendant to their agent as the purchase money of the plaintiffs' wools, purchased by him of such agent, and that such check had been proved to have been lost; secondly, that whether the check had been given for wools or not, it had become the property of the plaintiffs; and, thirdly, that they had obtained a promise from the defendant that he would give them another check for the like amount. As to the first point, he thought the evidence adduced by the plaintiffs was insufficient to prove their case; as to the second point, he was of opinion that the claim was deficient in allegations necessary to establish their right to relief in equity; and with regard to the third point it was sufficient to say that no consideration was shown to support the alleged promise. As, however, the claim had been filed by leave of the court previously obtained, he had felt reluctant to dismiss it at once, and he had carefully considered whether it could properly be put in a train for further inquiry. By reason, however, of the imperfect state of the evidence, he had been unable to see his way to the direction of any further proceedings, without, in effect, recommencing the cause, and recommencing it in a manner that would lead the parties to an expense and litigation far beyond what would be necessary in the regular course of suit by bill and answer. The orders of April 1850, enabling parties to proceed in this court by claim, were not, in his opinion, intended to apply to cases like the present. He was satisfied that leave would not have been given to file this claim, and that it could not have been asked for, if the case set up could have been anticipated. He was of opinion that the claim should be dismissed, and that the plaintiffs, who had not brought forward the whole case on their part, and had kept back material evidence which it was in their power to produce, had no right to complain if the court refused to give them the benefit of the summary course of proceeding

In the winding up of the Direct West End, &c., Railway Company, *ex parte* Lloyd.

under these orders. He purposely abstained from pointing out the defects in the evidence adduced, because he thought great mischief would ensue if these defects in cases tried on claims were pointed out, when the claim was dismissed, without prejudice to further proceedings being taken by the plaintiffs. It might lead to improper attempts to supply such defects in the event of such further proceedings being taken. In the course of the argument observations had been thrown out as to the inconvenience of holding parties to the strict rules of pleading in proceedings upon claims. As to that, he thought it right to say, that he thought the orders upon claims were not at all intended to affect or alter the ordinary rule of the court requiring parties to proceed in the establishment of their case *secundum allegata et probata*. The proper order, therefore, was to dismiss the claim, and, having regard to the fact that material evidence had been withheld on both sides, without costs; this order to be without prejudice to any other proceedings the parties might be advised to take.

IN THE WINDING UP OF THE DIRECT WEST END AND CROYDON
RAILWAY COMPANY, *ex parte* LLOYD.¹

January 20, 1851.

Joint-stock Companies Winding-up Acts — Creditor.

The registered secretary to a provisionally registered company, in pursuance of instructions given to him at a meeting of the members or committee of the company, gave orders to an advertising agent to cause the scheme, &c., of the company to be advertised. The agent executed the orders, and paid for the advertisements; and afterwards claimed, before the master charged with the winding up of the company, to be admitted a creditor of the company for the amount paid by him; but he did not know the names of the persons present at the meeting. The master declined to admit the claim as a proof, because the affidavits in support of it, did not establish a debt against any particular persons or against the whole class of contributories: and the court, on appeal, confirmed the master's decision.

LLOYD, an advertising agent, claimed, before the master charged with the winding up of the above-mentioned provisionally registered company, to be a creditor for 779*l.*, being the balance of an account due to him from the company, for advertising and causing to be advertised divers advertisements and public announcements in divers newspapers, at the request of the company. It appeared that all the orders for the advertisements were given to him by the registered secretary to the company, and that general instructions and authority had been given to the secretary, at a meeting of the members or a committee of the company, to duly advertise the scheme, proceedings, and requisitions of the company; but the names of the persons who were present at that meeting were wholly unknown to Lloyd, and therefore the master considered that he had not established a debt against

¹ 1 Sim. (n. s.) 248.

In the winding up of the Direct West End, &c., Railway Company, *ex parte* Lloyd.

any particular persons, or against the whole class of contributories, and declined to admit the claim as a proof, but admitted it as a claim.

The court was now moved, on Lloyd's behalf, that the master might be ordered to admit the claim as a proof. *Mr. Rolt* supported the motion, and *Mr. Bethell* opposed it, for the official manager.

Mr. Rolt said : The list of contributories is not yet finally settled ; and the master seems to have considered that as my client had not shown that every person whose name might be put on the list gave the order for the advertisements, he could not admit the claim as a debt. No doubt the master may, as in bankruptcy, admit what may ripen into a debt, as a claim ; but he must admit every thing that is a debt, as a debt, and not as a claim. Lloyd caused the advertisements to be published, in consequence of orders given to him by the registered secretary of the company ; and the company authorized their secretary to give the orders ; therefore, we have fixed a debt upon the company.

The VICE CHANCELLOR. Provisionally registered companies are not *quasi* corporations. They are merely associations of individuals formed for a particular purpose. You must show which of those individuals are liable to you.

Mr. Rolt. They are associations acting together for a common object, and having a common officer, who, in the ordinary course of business, acts on their behalf, and whose acts bind them. The creditors are not to determine who constitute the association, or in what proportions the members of it are liable to the debts. Those matters are left for future consideration. The debts are to be ascertained first, and then the contributories ; as appears from the Winding-up Act of 1848, where the seventy-first and four following sections relate, exclusively, to debts, and the seventy-sixth begins to give directions as to contributories. See also the 28th section of the act of 1849.

Mr. Bethell. Mr. Lloyd seeks to have his claim admitted as a debt of the whole body of contributories : but only those members of the provisional committee who were present at the meeting at which the secretary was authorized to give the orders for the advertisements are liable to him ; and, as he was unable to show which of the members were present at that meeting, the master was right in admitting his claim, merely as such. The 84th section of the act of 1848 empowers the master to make calls on individual contributories, so far as they may be liable to pay the same ; and all that the court can now do, is to allow Mr. Lloyd to go back to the master, and point out the persons who are liable to him.

Mr. Rolt replied.

The VICE CHANCELLOR. The master was quite right in not admitting Mr. Lloyd's claim as a proof ; for, if he had admitted it as a

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proof, he would have decided that the whole body of contributories was liable to Mr. Lloyd. The only question is, whether he has not done too much in admitting it as a claim.

Provisionally registered companies are not companies in the proper sense of the word: they are merely associations of individuals, and their liabilities must be dealt with as the liabilities of individuals. The legislature, it is said, has spoken of such associations as companies; but, though the legislature may declare the law by enactment, yet they are not interpreters of the law; and courts of justice are not bound by a mistake of the legislature, as to what the existing law is. This was so decided by the Court of King's Bench, in *Dore v. Gray*, 2 T. R. 358. If the framers of these acts thought that associations like that in the present case are companies, they thought wrong. The members of such associations may not be jointly liable for any single act that has been done in effecting the object for which they were formed. Each of them is liable only for the debts which he, either individually or in conjunction with some other member or members, has authorized to be incurred. Therefore, it would be quite improper for the master to admit debts, (as *Mr. Rolt* has contended he ought,) *de bene esse*; for that might be admitting debts which had no existence. If the debts claimed exist at all, they must be due from some one or more of the contributories; and the master is bound, before he admits a claim as a debt, to require the claimant to show him that the parties who gave the order in respect of which the claim is made, or some of them, have been ascertained to be contributories.

I am of opinion that what the master said, in this case, is substantially accurate; and I shall refuse the motion, with costs.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF QUEEN'S BENCH;
AND UPON
WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER.

FROM AND AFTER MICH. TERM, 14 VICT., A. D. 1850.

REGINA v. THE SOUTH DEVON RAILWAY COMPANY.¹

November 13, 1850.

Railway — Award of Compensation — Lands Clauses Consolidation Act — Payment of Arbitrators' Fees — Duty of Railway Company — Taking up Award — Mandamus.

A railway company are bound under the 35th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, to take up an award of compensation for land required by the company, and forthwith to furnish a copy to the owner of the land; and it is no good return to a *mandamus* for that purpose, that the company were willing to receive the award and to furnish such copy, but were prevented by reason of the arbitrator's refusal to deliver it up to them without the payment of his fees; there being nothing in the act to affect the arbitrator's common-law right of lien.

MANDAMUS to the South Devon Railway Company. The writ recited, amongst other matters, the provisions of the 25th, 26th, 27th, 28th, and 35th sections of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, which was incorporated in the company's act, 9 & 10 Vict. c. 402, called the South Devon Railway Act, (Amendment and Branches,) 1846; the 35th section providing that the arbitrators appointed under the previous sections "shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times on demand produce the said award, and allow the same to be inspected or examined by such party, or any person appointed by him for that purpose." The writ also recited the proceedings taken between the said company and John Bayly, the owner in fee of a certain piece of land, and a cottage and

¹ 20 Law J. Rep. (N. S.) Q. B. 145.

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premises, situate on the line of the South Devon Railway, under the above sections; by which, the question of the amount of compensation which the said John Bayly was entitled to receive from the said company, in respect of the said piece of land and premises, was ultimately left to the umpirage of George Powell. That the said George Powell thereupon made his award or umpirage, and afterwards, to wit, on the 19th of May, 1849, tendered the said award or umpirage to the said company, who, by their solicitors or agents, had admitted such tender in writing, [the writing was set out,] and required them to take up the same on payment of the said George Powell's costs of and attendant upon the arbitration. That the said John Bayly afterwards required the said company to take up the said award or umpirage, and that they had not done so, or furnished a copy thereof to the said John Bayly. The writ then commanded the said company to take up the said award or umpirage, and to furnish forthwith to the said John Bayly a copy of the same.

Return, that the said George Powell had tendered the said award or umpirage on and subject to the condition that they the said company should and would at and upon such delivery thereof, and concurrently therewith, pay him 87*l.* 11*s.* for his fees and charges as umpire, in and about the making of the said award or umpirage, and not otherwise, and that the said George Powell had then refused to deliver up the said award or umpirage, without payment by the company of the said amount. That the company were always ready and willing to accept and receive the said award or umpirage, on the same being delivered to them or their solicitors or agents, and to furnish a copy thereof, when so delivered, to the said John Bayly, but were hindered and prevented from so doing by reason of the said George Powell having always refused to deliver the same to them, without payment of the said sum of money so by him required and demanded as aforesaid.

Demurrer, for that the return showed no answer or excuse why the company should not be compelled to take up the award or umpirage, and give a copy to the said John Bayly. Joinder in demurrer.

Sir A. Cockburn, Solicitor General, (Crowder and Stephens with him,) in support of the demurrer. The question is whether, the award having been regularly made and tendered, it was not obligatory on the company to pay the costs of the umpire, and take up the award under the 34th and 35th sections of the 8 & 9 Vict. c. 18. The umpire was not required to deliver to the claimant, nor the claimant to receive the award. The promoters are the persons to receive it, and the obligation upon them to pay the reasonable costs of the award must necessarily be implied. The umpire has a lien upon the award, and he has no other reasonable means of obtaining the payment of such costs.

Sir F. Kelly, (Greenwood with him,) contra. The *mandamus* commands the company to "take up" the award, and the return states that they are willing to take it up. The well-understood meaning

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of "take up" here includes the payment of the costs. Now the 34th section of the 8 & 9 Vict. c. 18, provides how the costs of the arbitration are to be borne. The promoters are to bear all the costs, unless the same or a less sum be awarded than shall have been offered by them, in which case each party is to bear his own costs incident to the arbitration, and an equal proportion of the costs of the arbitrators. Then, the 35th section provides for the delivery up of the award to the promoters unconditionally. If the argument on the other side be upheld, as the parties might have to bear equally a proportion of the costs, which would not be known until the award had been delivered up, the company would afterwards be driven to bring an action for half the arbitrator's costs paid by them.

[*Lord Campbell, C. J.* Do you say, that the act was intended to deprive the arbitrator of his lien?]

Yes. Otherwise the construction of the railway may be stopped, until questions as to the payment and reasonableness of the arbitrator's costs had been settled. There is nothing in the act to call upon the company to advance money which another may be bound to pay.

The *Solicitor General* was not heard in reply.

LORD CAMPBELL, C. J. I am of opinion that the prosecutor is entitled to our judgment. The *mandamus* appears to me to be sufficiently framed under the 35th section of the 8 & 9 Vict. c. 18. Mr. Bayly shows that he was fairly entitled to a copy of the award, and that the company had not obtained possession of it as they were bound to do. The company can only be required to do what, by the 35th section, they are directed to do. The question then is, Have the company made a proper return? Their return is simply, that the arbitrator will not give up the award without his fees being first paid. The only excuse, therefore, is, the default of the company in their duty towards the arbitrator, in not doing what the act requires them to do, so that they are seeking to take advantage of their own wrong. The return, therefore, appears to me, under the circumstances of this case, to be insufficient.

COLERIDGE, J. The act expressly provides for the delivery of the award to one of the two parties, namely, "to the promoters of the undertaking," and takes away the discretion in that respect which the arbitrator usually possesses. If that be so, the act also impliedly directs that the party to whom the award is to be delivered shall receive it; and a direction to receive the award is a direction to take it up; and one thing necessary for that purpose is, the payment of the arbitrator's fees, which the company refuse to do. The act does not touch the lien which the arbitrator possesses. It does not anywhere impose upon him the absolute duty to deliver up the award. It does not state any thing as to the mode in which the arbitrator is to be satisfied. All that is left just as it had been before at common law. I think, therefore, the return is not sufficient.

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WIGHTMAN, J. I think the act was never meant to take away the arbitrator's right of lien at common law. On the other hand, it imposes upon the company the direct duty of taking up the award. There might be circumstances affording a reasonable excuse for the non-performance of that duty, but nothing of that kind is shown here.

ERLE, J. It was the duty of the company, under the act, to take up the award, and impliedly to satisfy the claim of the arbitrator. It is one in a series of steps with which the company must comply, in exercising the power given them to take land. The courts of law in several cases have come to the very salutary conclusion, that if the company choose to begin proceedings, and so put the other party to inconvenience in respect of his property, they will be compelled to go on in the matter. When, therefore, the company proceed by arbitration, they must be compellable to take up the award, that being a duty cast upon them which they are bound to act up to.

Judgment for the crown.

REGINA v. THE CALEDONIAN RAILWAY COMPANY.¹

November 20, 1850.

Railway Company — Mandamus — Construction of Cross-road Bridge, &c. — Rates of Inclination — Compliance with Plans deposited — 8 & 9 Vict. c. 20 — 9 & 10 Vict. c. 249.

Mandamus commanding the Caledonian Railway Company to construct a public carriage road, and a bridge for carrying the same over the railway, and the approaches thereto, under the obligations contained in the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, and the company's special act, and in conformity with a plan, section, and cross section, deposited with the clerk of the peace, and as therein particularly marked. From the return by the company it appeared, that in making the railway within the deviation line authorized by the special act, a part of the said carriage road and the rates of inclination thereof, as delineated in the said cross section, had been altered, and that it was impossible, consistently with such deviation line, to make and complete the alteration in the said road, in conformity with the rates of inclination delineated in the said plan and section and cross section:—

Held, upon demurrer, that the 14th section of the 8 & 9 Vict. c. 20, applied to the construction of the railway and not to cross roads; and that the 9th section of the special act, 9 & 10 Vict. c. 249, providing that it should be lawful for the company to construct the bridges for carrying the railways thereby authorized over any roads, of the heights and spans and in the manner shown on the sections deposited, applied only to the heights and spans, and not to the rates of inclination delineated in the sections deposited; and therefore that the *mandamus* could not be supported.

MANDAMUS to the Caledonian Railway Company, commanding them to make, construct and complete, under the powers and obligations contained in the Railways Clauses Consolidation Act, the Caledonian Railway Act, and the Caledonian Railway Carlisle Deviation Act, and according to and in conformity with the plan, section

¹ 20 Law J. Rep. (N. S.) Q. B. 147. 15 Jur. 396.

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and cross section No. 3 belonging to, and in connection with, and referred to by the said Caledonian Railway Carlisle Deviation Act, duly deposited with the clerk of the peace for the county of Cumberland, a certain public carriage road in the said last-mentioned deposited section and in the said cross section referring thereto, marked with the number 3; also, the bridge or arch specified in the said deposited section as of 30 feet span and 15 feet 6 inches in height, for the purpose of carrying the said carriage road over the line of railway constructed under the said last-mentioned act, &c., and likewise the several approaches to the said bridge and carriage road and works connected therewith. Return by the company, stating that the said public carriage road was not a turnpike road, and that in making the deviation line authorized by the Caledonian Railway Carlisle Deviation Act, 1846, they altered a certain part only of the line of the said carriage road and the rates of inclination thereof, [the return described particularly the particular part altered;] that the company had made the said alteration as by law they were bound to do, and not otherwise; that the said cross section, No. 3, was a section of the said carriage road delineating the line and levels and inclinations thereof, but not delineating or describing the lines or level of the said lines of railway authorized by the said Deviation Act, 1846, or any point thereof, save at the point of intersection of the line with the said carriage road, and the level of the line of railway had always been, and still was, within two feet of the same level as described in the said cross section No. 3, which was not a section describing the common *datum* line, but the same throughout was described in a certain other section not being a cross section, but one of the sections deposited as stated in the writ; that the said proposed alteration of the carriage road was not, nor was proposed to be, any part of the deviation line of railway, nor was the same any engineering work in the formation of the said railway itself, or within the meaning of the Railways Clauses Consolidation Act, nor described as such in any of the plans or sections so deposited as aforesaid; but that the same was the projected mode of the deviation line passing the said road by a bridge for carrying the said road over the said railway within the meaning of the said Railways Clauses Consolidation Act; that the said bridge had been constructed of the height and span required by the plans and sections. The return then described the rate of inclination and width of the road as altered, and of the approaches to the bridge, and the bridge itself; and further stated, that for the proper construction of the railway, it was necessary, at the part crossed by the said carriage road, to deviate to an extent not exceeding two feet from the level of the said deviation line of railway, as referred to in the common *datum* line described in the said section; that in consequence of such deviation the gradients were diminished, and it was absolutely impossible to make and complete the alteration in the said carriage road in conformity with the said plans, sections, and cross section No. 3, and with the rates of inclination delineated and shown therein, and that such impossibility was occasioned by reason of an error in the said cross section No. 3 as to the crossing of the said road.

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There were pleas traversing several of the allegations in the return, to which there was a demurrer and joinder in demurrer. The pleas, however, were abandoned, and the main question upon the writ and return was, whether the company were bound by the rates of inclination in the plans and sections deposited with the clerk of the peace, as respected the carrying of the carriage road across the line of railway.

Rew, for the defendants, (November 13.) First, as to the rates of inclination, the plans and sections as deposited are merely for the purpose of showing the general character of the scheme to the legislature and the public. They are only obligatory on the company to the extent that the act for the formation of the railway makes them. *The North British Railway Company v. Todd*, 12 Cl. & F. 722. *Breynton v. The London and North-western Railway Company*, 10 Beav. 238. Before the passing of the act they are to be treated merely as preliminary matters, just as in cases of contract. Now, the general act binds the company strictly to the line of railway as shown in the plans and sections, allowing a deviation within certain limits; but when the act deals with cross roads, it does not refer to any plans and sections, but only confines the company to providing for the public safety and convenience. If they were bound by the cross sections to the same extent as in the construction of the line itself, it would be quite impracticable for the company to comply with the requisitions of the act. Sects. 11, 12, and 15 of the general act 8 & 9 Vict. c. 20, provide for the extent of deviation from the *datum* line to be allowed in the construction of the line. The 13th section provides for the making of the arches, tunnels, &c., of the railway according to the deposited plans and sections, subject to the 14th section, which provides that the company shall not "deviate from or alter the gradients, curves, tunnels, or other engineering works described in the said plan or section," except within the limits therein stated. This is not an engineering work within the meaning of sect. 14. The words in that section, "the said plan and section," by reference back to the 11th section appear to refer to the line of railway itself, and to apply only to the plans and sections upon which the common *datum* line is marked. *Beardmer v. The London and North-western Railway Company*, 1 Hall & Twells, 161; s. c. 18 Law J. Rep. (N. S.) Chanc. 432, is an express authority for that. If it were otherwise, the company would be tied down most inconsistently as regarded the cross sections. The 16th section is the empowering clause which applies almost exclusively to cross works, and the 46th, 49th, 50th, 53d, and 56th sections contain the restrictions referred to in that section, and they show that the public convenience is the matter to be looked to. As, therefore, the rate of inclination in the plans and sections does not apply to the cross sections, the writ asks too much, and the court cannot grant a peremptory *mandamus*. *The King v. St. Pancras*, 3 Ad. & E. 535. *The Queen v. The Tithe Commissioners for England and Wales*, 19 Law J. Rep. (N. S.) Q. B. 177. Then, as to the construction of the bridge, the question is, whether the 9th section of the special act,

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9 & 10 Vict. c. 249, which enacts that it shall be lawful for the company to construct the bridges for carrying any roads over the railway thereby authorized, of the heights and spans, and in the manner shown on the section deposited as therein mentioned, is enabling or restrictive. The words "shall be lawful" are permissive.

[*Lord Campbell, C. J.* There is a difference whether a benefit is conferred or an obligation is imposed.]

No doubt the question is whether the public benefit or that of the company is intended. In the general act provision is made for the public convenience, and it is not to be supposed that this provision ties down the company more strictly. The two acts are to be read together, and the clause in the local act would then appear to be an enabling clause, to be restrained only by the public convenience. A further argument here is the impracticability stated in the return. If it had been meant to set up that the plans and sections have not been substantially complied with, that should have been pleaded, and the question of fact tried. But as the return now stands, it is, if supported, an answer. *The Queen v. The Birmingham and Gloucester Railway Company*, 2 Q. B. Rep. 47; s. c. 10 Law J. Rep. (N. s.) Q. B. 322.

Sir A. Cockburn, Solicitor General, (*Greig and P. Thompson* with him,) contra. The 9th section of the special act is mainly relied upon. The provisions of that section are compulsory, as is shown more particularly by a reference to the 5th section, which binds the company, if they think fit to make the railway, to the deposited plans and sections. The general act is to apply, if the special act does not. *The North British Railway Company v. Todd. Beardmer v. The London and North-western Railway Company*. Where any reference to the plans and sections is made by the special act, they are to be taken as incorporated with it; and that being so here, the company have not complied with them as they were bound, and the *mandamus* ought to go. The 9th section is not to be found in the other acts, and was introduced specially to protect the public highways. The whole question is, whether that section is compulsory.

[*Lord Campbell, C. J.* And to what extent?]

No doubt; and if there be any ambiguity of construction, several cases show that as public rights are interfered with, it is to be taken strictly against the company. It is clear also that the words, "shall be lawful," are compulsory where the purpose of the section is the public benefit, and the preamble in the 1st section shows that public convenience was the object in passing the act. If the 9th section be considered as merely permissive, so must the 5th section, which requires the railway to be made according to the deposited plans and sections. As to the argument of impossibility, the act was passed for the purpose of securing particular privileges to the company, and with special reference to the plans and sections, and if there be any error in the plans and sections, the company cannot now take advantage of such error. In case of difficulty, there is an easy remedy given by reference to the Board of Trade, 8 & 9 Vict. c. 20, s. 66.

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Reu in reply. There is nothing in the act that refers to the sect. No. 3, and the 9th section is not to be read as if it had said that the roads on the railway shall be of the rate of inclination shown in the plans. It never could have been meant that the rates of inclination were to be gone into minutely. The words are satisfied by showing that the road crosses over the places specified. If the word "manner" in the section embraced every thing, there would have been no necessity to specify the height and span. There is nothing to fix the precise level.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

LORD CAMPBELL, C. J. After reading the mandatory part of the writ, his lordship proceeded: Before a peremptory *mandamus* issues, it lies on the prosecutors to show that all that is commanded is a duty imposed by law on the defendants. We consider it to be quite settled, that when a peremptory *mandamus* has issued, if any part of it is unlawful the whole must be set aside. It is, therefore, necessary to show that there is an obligation on the part of the defendants to make the road according to the rates of inclination delineated and shown in the plans and sections deposited with the clerk of the peace. It is quite clear on general principles, and on the authority of the case of *The North British Railway Company v. Todd*, that the mere exhibition of plans and sections in Parliament does not make them obligatory upon the company when they obtain an act; it can only be something in the special act itself or the general act which can have that effect. It is merely like a negotiation in the course of entering into a private contract, which ceases to have any effect as soon as there is a written agreement between the parties. It was supposed that by the general act, the 8 & 9 Vict. c. 20, s. 14, this obligation must be imposed, considering this road as an "engineering work;" but it is quite clear that section applies only to the construction of the railway, and not to cross roads. Then it has been allowed that in the first special act there is nothing to make these plans and sections obligatory. But reliance is placed on the 9th section of the 9 & 10 Vict. c. 249, which provides that "it shall be lawful to the said company to construct the bridge for carrying the railway hereby authorized over any roads, or for carrying any roads over the said railway, of the heights and spans and in the manner shown on the section deposited as hereinbefore mentioned." The inclination of my opinion is, that this section is obligatory so far as it goes; but the question is, To what extent does it go? And we think that it only applies to the heights and spans delineated in the plans and sections, which are expressed, and *expressio unius est exclusio alterius*. There is nothing said as to the rates of inclination, and it would be strange if they had been in the same way rendered obligatory, because there is a power of deviation from the *datum* line of railway which would render them wholly inapplicable. Therefore, we

¹ LORD CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, JJ.
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think, sect. 9 of the supplemental act applies only to the heights and spans delineated in the plans and sections deposited, and they have been followed, although the rates of inclination have been altered. The writ of *mandamus*, consequently, cannot be supported in part, and there must, therefore, be judgment for the defendants.

Judgment for the defendants.

SMALL¹ v. GIBSON.¹

Michaelmas Term, December 18, 1849, and November 27, 1850.

Insurance — Time Policy — Warranty.

To an action on a time policy of insurance, commencing on the 25th September, 1843, the defendant pleaded, that the ship was not, at the commencement of the risk, nor at the making of the policy, nor on the 25th September, 1843, seaworthy, or in a fit and proper condition safely to go to sea; whereupon, and upon issue found for the defendant, the plaintiff moved for judgment *non obstante veredicto*: but *held*, that the plea is a sufficient answer to the action.

There is an implied warranty of seaworthiness in *time* policies, if nothing appear in them to the contrary, as well as in policies of a voyage. [But see *post*, p. 299.]

The warranty applies, in time policies as well as in policies for a voyage, at the period when the risk commences, and not of necessity at the period when the ship goes to sea. [But see *post*, p. 299.]

THIS was an action on a policy of insurance on a ship called the Susan, "lost or not lost, in port and at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months, commencing on the 25th of September, 1843." The loss was alleged to be occasioned by perils of the sea. The defendant, among other pleas, pleaded that the ship was not, at the commencement of the risk, nor at the making of the policy, nor on the 25th of September, 1843, seaworthy, or in fit and proper condition safely to go to sea. The plaintiff replied *de injuria* to the plea denying seaworthiness, and the jury found a verdict for the defendant in the terms of the plea. The plaintiff, who had succeeded on the other issues, moved for judgment, *non obstante veredicto*, on the issue as to seaworthiness, on the ground that there was no implied warranty of seaworthiness in a time policy, and that the rules of the law of insurance as to such a warranty were not applicable to the case of a time policy.

Sir F. Thesiger and *James Wilde* now showed cause.² A warranty on the part of the owner of the ship of seaworthiness is to be implied in all policies, whether they be for time or for a voyage, and such warranty applies, as well in one case as the other, to the time when the risk is to commence. It was argued in moving, first, that no warranty of seaworthiness can be implied in a time policy; and, second-

¹ 14 Jur. 368; 15 Jur. 325.

² November 13, 1849. Coram COLERIDGE, WIGHTMAN, and ERLE, JJ

ly, that if such a warranty can be implied in a time policy, it is not so large as a warranty of the same species in an ordinary policy on a voyage. The warranty in a time policy, it was said, only applies at the time the ship goes to sea upon the voyage during which the time policy is to attach and the risk of the underwriter under it is to commence. In other words, if the risk is to commence on some day during a particular voyage, the warranty, if there be one, is satisfied if the ship was seaworthy when she went to sea. The argument they used was, that, if the ship was seaworthy when she left port, it does not signify whether she was seaworthy at the day the risk commenced; and therefore the allegation in the plea that she was unseaworthy on the 25th of September, and at the time the risk commenced, is immaterial; and consequently the plaintiff ought to recover, notwithstanding the verdict upon the issue on that plea is found for the defendant. The distinction which was taken between a time policy and a policy for a voyage was founded upon an asserted principle of law. The warranty of seaworthiness is implied in ordinary policies on a voyage, it is said, on this ground, that the owner must be taken to know, at the time at which the risk commences in those policies — that is, at the time the ship goes to sea — whether she is seaworthy or not; he knows it either by himself or his master, who is his agent; the ship at that time ought to be seaworthy, or the underwriter is deceived; it is the duty of the owner to provide that she is seaworthy at that time; the owner, therefore, shall be taken to warrant to the underwriter, that, at the time the ship leaves port, she is seaworthy. But that principle, it was said, does not apply, and therefore the rule does not apply to a time policy, which is usually made to attach, which in the ordinary course of business is made to attach, when the ship is at sea. The owner cannot, in such case, know the condition of the ship at the time the policy is to attach, and the underwriter knows that the owner can have no such knowledge. It cannot, therefore, be an implication of law in such case that the parties are dealing upon the footing that the owner warrants that, at the time when the risk is to commence, when the ship is at sea, and has been probably for months, and the owner cannot know what has happened to her, she is seaworthy. Now, the answer to this argument is, that the rule in the case of a policy on a voyage is not founded upon any such principle of law as has been asserted. If it is founded upon such a principle, it cannot apply when the principle does not apply. The principle does not apply in the case of a home policy — of a policy made in London, for instance, on a ship from Bombay. How can the owner in London know the condition of the ship in Bombay? Yet it has been held, that, in such a policy, the warranty of seaworthiness must be implied. Take the case, again, of a policy from a port abroad, where there are no means of repairing the ship; can it be the duty of the owner to repair the ship where he can have no means? Yet in such case, also, the warranty has been held to attach. Is the legal implication of this warranty to be made to depend upon an inquiry into the state of the foreign port? or were these cases wrongly decided? Is not the answer rather, that the principle assigned for the

rule is wrong? In truth, the principle upon which this rule, of an implied warranty of seaworthiness, rests, is entirely different. The contract of insurance is a contract of indemnity. In order that the rate of insurance, and the amount of damage in case of loss, may be accurately ascertained between the parties, the first at the time of entering into the contract, and the second after the loss, it is necessary that it should be assumed that the ship was in a perfect condition to perform her voyage at the moment the risk was to commence. If she was not perfect then, how could the parties tell what rate of insurance they ought to agree upon? It must have depended, in such case, upon the amount of defect in the ship. Or how, in case of damage, could they tell what part of it was caused by the risks insured against, and what by the original defects in the ship? It is to avoid such difficulties as these that the law assumes, if nothing appear to the contrary, that the parties agreed that it should be considered that, at the moment of the commencement of the risk, the ship was seaworthy, and that if she was not the policy should be ineffective. Knowledge or ignorance is, in this view, evidently of no consequence, nor any supposed duty of the owner; and the principle asserted by the other side, and the distinction founded upon it, fail. All the authorities are in accordance with the principle now enunciated, and lay down expressly, with regard to the warranty of seaworthiness, that the knowledge or ignorance of the owner as to the condition of the ship is immaterial. None of them make any distinction between a policy on a voyage and a time policy. "Every ship insured must, at the time of the insurance, be able to perform the voyage, unless some external accident should happen; and, if she have a latent defect wholly unknown to the parties, that will vacate the contract, and the insurers are discharged. There is in the contract of insurance a tacit and implied agreement that every thing shall be in that state and condition in which it ought to be; and therefore it is not sufficient for the insured to say that he did not know that the ship was not seaworthy. The ship is the *substratum* of the contract between the parties; a ship not capable of performing the voyage is the same as if there were no ship at all; and although the defect may not be known to the person insured, yet, the very foundation of the contract being gone, the law is clearly in favor of the underwriter." 1 Park Ins. 458, 8th ed. tit. "Of Seaworthiness." *Mills v. Roebuck*, Id. 460, will probably be referred to.

[*Shee, Serj.* I shall not refer to it; nobody can understand it.]

It seemed to be relied on in moving this rule, as it is quoted in *March v. Pigot*, 5 Burr. 2802; or rather the *dictum* there attributed to Lord Mansfield was relied on, "that the insured ought to know whether his ship was seaworthy or not *at the time she set out* upon her voyage; *but how should he know* the condition she might be in *after she had been out a twelvemonth?*" Yet the account given of *Mills v. Roebuck*, by Park, J., is inconsistent with any such distinction as is attempted to be drawn from this *dictum*. "The plaintiff is bound to show that the ship was seaworthy for the voyage insured. It is a condition precedent, and if not complied with, so that the peril was

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enhanced, from whatever cause this might arise, and though no fraud was intended on the part of the assured, the underwriters may answer, 'We are not liable.' Per Lord Ellenborough, C. J., in *Weddernburn v. Bell*, 1 Camp. 1. "I also doubt whether there is any analogy between a case like the present and cases where there is an implied warranty of seaworthiness. The latter is implied from the nature of a contract of insurance. The consideration of an insurance is paid in order that the owner of a ship which is capable of performing her voyage may be indemnified against certain contingencies; and it supposes the possibility of the underwriter gaining the premium; but if the ship be incapable of performing her voyage, there is no possibility of the underwriter gaining the premium; and if the consideration fail, the obligation fails." Per Lawrence, J., in *Christie v. Secretan*, 8 T. R. 192. "I have often had occasion to observe here, that there is nothing in matters of insurance of more importance than the implied warranty that a ship is seaworthy when she sails upon the voyage insured. It is not necessary to inquire whether the owner acted honestly or fairly in the transaction; for it is clear law, that however just or honest the intentions and conduct of the owner may be, if he be mistaken in the fact, and the vessel, in fact, be not seaworthy, the underwriter is not liable." Per Lord Eldon, in *Douglas v. Scougall*, 4 Dow, 269.

So in *Parmeter v. Cousins*, 2 Camp. 235, it was held by Lord Ellenborough, C. J., that, upon a policy *at and from*, the underwriter could not be liable, unless the ship was once safe and seaworthy *at the place*. In *Lee v. Beach*, 1 Park Ins. 468, 8th ed., the ship was fully examined under the eye of the owner, and repaired to the satisfaction of every one who saw her; yet there was a latent defect in her afterwards made apparent, and the underwriter was excused in consequence. In *Oliver v. Cowley*, Id. 470, where the assured, though owner of the cargo, was not owner of the ship, and so had no power to get her repaired if he would, it was held, that the warranty must be implied. In *Hucks v. Thornton*, Holt, 30, the existence of this warranty in a time policy is assumed by all parties. The discussion is taken only upon its extent. In *Hollingworth v. Brodrick*, 7 Ad. & El. 40, the policy was a time policy. The plea was, that after the making of the policy, and during the time the ship was insured, and before the loss, the ship was unseaworthy. Upon demurrer the plea was held ill. "It is clear that the implied warranty of seaworthiness is satisfied if the ship is seaworthy at the commencement of the risk. I do not know of any distinction on account of the risk being for time." Per Patteson, J. In the case of *Dixon v. Sadler*, 5 M. & W. 405, which was also a time policy, the existence of this warranty in the policy was again conceded by all; and Park, B., who delivered the judgment of the court, declined to draw any distinction, as to its extent, between a time policy and others. "In the case," he says, "of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state, as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary

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perils of the voyage insured, at the time of sailing upon it. There are not any cases in which the obligation of the assured in the case of a time policy, as to the seaworthiness or navigation of the vessel, is settled. It may, however, be safely laid down that it is not more extensive than in the case of an ordinary policy," &c. And per Tindal, C. J., in the same case, in error, 8 M. & W. 885, "No stress was laid, in the course of the argument before us, upon any distinction to be taken between the implied warranty, on the part of the assured, as to the seaworthiness of the ship, in the case of a policy on a particular voyage, and of a time policy; nor do we think any such distinction can be held to exist." It has always been usual for merchants to insert in time policies an exemption from this warranty, if it was intended that it should not attach. That shows their opinion. But now it is said that this warranty cannot be implied. Such exemption therefore, though always used by merchants and insurers, has, according to the argument, been always useless. The argument on the other side also seems to assume that a time policy must necessarily attach whilst the ship is at sea; but that is not always so, and the argument must not rest on that foot. As to the second point, if the meaning of a warranty of seaworthiness in a time policy is, that the ship was seaworthy when she left her last port, the allegation in the plea, that she was not seaworthy, means the same thing. If the meaning of the warranty in a time policy be, that the ship need only be, at the day of the commencement of the risk, in such a state as a ship would be which had been at sea for the time the ship insured has, but which was in good condition and equipment at leaving port, then the meaning of the allegation in the plea is, that she was not in such state at the commencement of the risk, and was not in good condition and equipment at leaving port. Seaworthiness is a complex term in the plea, as it was in the policy. Whatever seaworthiness means in a time policy, the jury have found that this ship was not seaworthy within that meaning. If the warranty be construed otherwise than simply, that the ship was seaworthy at the commencement of the risk, all sorts of vexatious inquiries will be opened. *Paddock v. The Franklin Insurance Company*, 11 Pick. 227, quoted in 1 Ph. Ins. 333, 2d ed., is no authority for a contrary doctrine; it only suggests the propriety of construing this warranty of seaworthiness liberally.

Shee, Serj., and *Unthank*, in support of the rule.

This is a most important question. If the argument of the other side prevails, merchants, who have thought themselves secure in making insurance upon their ships, abroad or at sea, have really no security. These time policies are almost always made upon ships abroad or at sea. If their argument prevails, there must be great hardship on merchants. Suppose a ship, insured upon her outward voyage, arrives at Bombay in August, and is there fully repaired, before the end of August, by funds of the owner previously forwarded for that purpose; her owner, in England, calculating that she will not leave Bombay before the end of September, insures her again, lost or

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not lost, from the 25th September, but she leaves in August, as soon as she is repaired. If she is damaged at sea before the 25th September, and yet receives her death blow afterwards, the owner, notwithstanding all his care, has no indemnity under either policy. It is on account of such hardship as this, arising solely from the forced ignorance of the owner as to the condition of his absent ship, that we say that it cannot be implied in law that he warranted that she was, on a given day, in perfect condition. To obviate the force of this argument, which was foreseen, and to show that, in contemplation of the merchants and insurers, there was always such a warranty implied in time policies, if nothing to the contrary appeared, it was said, that always, if a merchant did not wish to make this warranty in a time policy, a clause to that effect was inserted. But it is said in *Westgate on Insurance*, that this clause was first invented while the courts, to the astonishment of the merchants, were doubting, in the case of *Mills v. Roebuck*, whether such an implication ought to be made. It was never contended, in moving this rule, that the question of the implication of the warranty was to be decided on the ground of there being no possibility of knowledge in the assured, by himself or his agent. In many instances, it is obvious that he may have knowledge. But the question is, considering that the implication must be made in all time policies if it be made in one, and considering that time policies are almost always made when the ship is at sea, whether, in the case of time policies where no express warranty is made, it is reasonable in the court to imply such a contract. Once allow that there is such a warranty, and no doubt knowledge, on the part of the owner, of the condition of the ship, is beside the question; but when an implication is to be made, it seems most material to consider whether a reasonable man can be supposed to have made such a contract without knowledge. That was the only way in which Lord Mansfield's dictum was cited. He points out a clear distinction in the state of things, under ordinary circumstances at the time of the commencement of the risk, between a policy for a voyage and a time policy. The question raised on the record is, whether the fact of the ship being, on the 25th September, or at the commencement of the risk, in such a condition as that, if she had then been in port, she would not have been fit to go to sea, is an answer to this action. We contend that it is not. We say, first, that no implication of a warranty of seaworthiness ought to be made in a time policy: and, secondly, we say, that if there is such a warranty in a time policy, it is only a warranty that the ship shall be seaworthy when she goes to sea, whether that be before or after the risk is to commence; and we say so in that case, because we say the term "seaworthy" must have a fixed, and determinate, and the same meaning, in all policies in which it is found, or is to be implied.

[*Erle, J.* It has been decided otherwise. It means another condition, if the ship be navigating a canal, than it does if she be a sea-going ship.]

That is a difference in the circumstances of the ship, not in the meaning of the term. The term "seaworthy," in all policies, and in

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all laws, means navigable, fit for navigation, on the voyage insured. It applies, and can from its nature only apply, to the moment when the ship is to go to sea. Whether the risk under the policy is to commence before or after that time, the warranty of seaworthiness, if there be one, applies only to the moment of going to sea.

[Coleridge, J. Do you mean to say, that in a policy "at and from," there is no warranty whilst the ship is at the place, but only when she goes to sea?]

There is no warranty of seaworthiness applicable until that moment. There may be another warranty, as that the ship ought to be found in certain things fit for her condition in port. But the question here is, whether, whilst she is in port, she must be seaworthy. We say not.

[Coleridge, J. Has it not been held otherwise, and that the only difference is, that there is a different amount of seaworthiness warranted in the two stages?]

There is no other meaning which the word "seaworthiness" will bear but "navigability," i. e., fitness to go to sea for the voyage insured. All the authorities, when examined, either directly support, or are not inconsistent with, this interpretation of the term. In *Smith v. Surridge*, 4 Esp. 25, Lord Kenyon, C. J., expressly decides that the warranty of seaworthiness does not attach until the ship goes to sea. "The policy," he says, "was at and from Pillaw. Such a policy at and from a place attached on the ship while she was undergoing repairs; yet it *was not necessary that she should be seaworthy at the time of the insurance.*" In *Purmeter v. Cousins*, 2 Camp. 235, which was also a policy at and from, Lord Ellenborough guards himself very carefully. He does not apply the term "seaworthiness" to the condition of the ship whilst at the place, but only when he supposes her at sea. "To be sure," he says, "while the ship remains at the place, a state of repair and equipment," he does not say seaworthiness, "may be sufficient, which would constitute unseaworthiness," (now he uses the term,) "after the commencement of the voyage." In *Aanen v. Woodman*, 3 Taunt. 299, the policy was at and from Surinam. The plea was, that the ship was not seaworthy. The proof was, that the ship, having started on her voyage, was lost in descending the river; that she was sufficiently manned for the river navigation, but that she had not a proper crew to go to sea, supposing she had reached the mouth of the river. Mansfield, C. J., and Lawrence, J., were both of opinion that the assured could recover, and that the time for the application of the warranty of seaworthiness had not arrived. "Suppose the vessel had been burned in the harbor at Surinam, would not the plaintiff have been entitled to recover, as for a total loss? It is not necessary that, at the time of the contract, the vessel should be seaworthy for the voyage. *The condition that she shall be seaworthy for the voyage does not attach till her sailing.*" Per Lawrence, J. "The circumstance by which breach of this warranty is ascertained," says Sewall, J., in *Taylor v. Lowell*, 3 Mass. 382, quoted 1 Ph. Ins. 317, 2d ed., "is *the sailing of the vessel in an innavigable state.* Until then, there is an opportunity of curing the latent defects, if they should be discovered; and their mere existence, while not prejudicial or material to the risk

insured, is not a forfeiture of the contract." In *Forbes v. Wilson*, 1 Park Ins. 472, 8th ed., the very question raised was as to the meaning of the warranty of seaworthiness in a policy at and from a place. It was contended that, since the risk commenced at that place, the warranty also commenced there. But Lord Kenyon said, "It is sufficient if the ship be seaworthy *at the time of sailing*." In *Hibbert v. Martin*, Id. 473, Lord Ellenborough also says, speaking of the state of the ship at a place, "It is quite sufficient if the state of the ship be commensurate to her then risk." In *Motteux v. The London Insurance Company*, 1 Atk. 545, Lord Hardwicke also fixes the time for the application of this warranty at the time of going to sea. The policies were from the arrival of the ship at Port St. George; but after arriving there, the ship, being in a decayed condition, went back to Bengal to repair. The question was, whether a loss which happened after the departure of the ship from Bengal, and before she again came to Port St. George, was a loss on the homeward voyage. Lord Hardwicke gave his opinion that it was, because, it being in general the duty of the owner to have the ship put in good repair at the very place *from which the voyage is to commence*, he said, if the state of decay became so imminent that the captain was obliged to go back to Bengal to repair, the port into which he went there was to be considered equivalent to the port mentioned in the policy. Then as to the cases quoted. In *Hollinworth v. Brodrick*, Patteson, J., no doubt, says, that time policies and policies on a voyage contain the same warranty as to seaworthiness; but if it has been rightly argued, that the time when such warranty attaches is, in all cases, the time when the ship goes to sea, that *dictum* is not against the plaintiff. In *Dixon v. Sadler*, Parke, B., expressly explains the meaning of the term "seaworthy" to be, that the ship was in a fit state, as to repairs, equipment, and crew, *at the time of sailing*; and in *Christie v. Secretan*, and *Douglas v. Scougall*, the time referred to is always the time of sailing.

[*Erle, J.* Surely, "seaworthy" means more than fit to go to sea. Where there has been no dispute that the ship was fully manned when she went to sea, it has been held that she was unseaworthy, because she had no pilot to bring her into port.]

It is very important that the law of England as to insurance should accord with the laws of foreign states; but in them there is no warranty known under the general name of seaworthiness. That which is analogous, or rather equivalent, is a condition that the ship should be fit to navigate au depart, c'est à dire, lorsque le vaisseau fait voile. The only word, in the French authors, used to express the failure of this condition, is "innavigabilité." See Ord. of Louis XIV. tit. "Assurance;" and Valin, tit. "Fret et Assurance;" also Pothier, "Traité d'Assurance," n. 6; 1 Emerigon, 580; and "Questiones Jurisprivati," Bankershocke. In *Dixon v. Sadler*, Parke, B., puts this implied warranty, on the part of the owner to the insurer, on the same footing as the similar warranty from the owner to the freighter. The effect of the latter is given in Abb. Ship. 342, 343, 8th ed.: "The contract of insurance is clearly void, if the ship, *at the commencement of the voyage*, be not seaworthy." And again, "Not only must the ship and her furniture be sufficient for the voyage, but she must be also furnished,

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at the time of sailing, with a competent master," &c. And in the Code de Commerce, art. 297, "Le capitaine perd son fret, et répond des dommages intérêts de l'affrèteur, si celui-ci prouve que, lorsque le navire a fait voile, il était hors d'état de naviguer."

COLERIDGE, J., now delivered the judgment of the court. After stating the facts as above, he proceeded: Upon the argument, many cases from foreign jurists were cited, and several decisions in the courts of America, as well as in our own, and it was urged for the plaintiff that this was the first time that the point had been directly presented for decision to an English court. We have taken time to consider our judgment, not so much from any doubt that we entertained upon the point, but that we might consult the various authorities referred to, and consider whether the arguments on the part of the defendant were really well founded.

Notwithstanding some *dicta* in Emerigon and other foreign jurists that were cited upon the argument, the opinion of all the lawyers in modern times, in England and America, is clear, that there is no difference between a time policy and one for a particular voyage, as to the implied warranty of seaworthiness. The doubt has arisen from the supposed difficulty of applying the rule of such an implied warranty to the case of a time policy, when it may be quite uncertain upon what service the vessel may be employed, or in what state she may be when the risk begins. The vessel, at the time the risk attaches, may be actually upon a voyage, for which she was perfectly seaworthy when the voyage commenced, but may, by perils of the sea, have been, whilst upon her voyage, reduced to such a state as to be unseaworthy when the risk attached; and it is said, that to apply the rule of implied warranty to such a case, would be an extension of the rule as to the warranty, which is satisfied if the vessel was seaworthy at the commencement of the voyage upon which she was engaged at the time the risk attached.

In *Hollingsworth v. Brodrick*, 7 Ad. & El. 47, the defendant contended that, upon a time policy, the assured were bound to keep the vessel seaworthy during the whole period of the insurance; but the court was of opinion that the warranty was fulfilled if the ship was seaworthy at the commencement of the risk; and this opinion was confirmed in the case of *Sadler v. Dixon*, 8 M. & W. 898, in which the Court of Exchequer Chamber decided, "that there was no distinction between the implied warranty of seaworthiness in the case of a policy on a particular voyage and on a time policy." Since this decision, which is the leading authority in our courts upon this subject, it may be considered settled, that the implied warranty extends to time as well as to other policies, and that the period to which the warranty applies is that when the risk attaches.

In the present case nothing appears upon the pleadings to limit or qualify the implied warranty, or to show that it had been fulfilled when the risk commenced. We are, therefore, of opinion, upon the authority of the cases cited for the defendants, as well in the English as the American courts, that the plea is good, and the defendant entitled to our judgment.

Judgment for defendant.

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IN THE EXCHEQUER CHAMBER.

[ERROR FROM THE COURT OF QUEEN'S BENCH.]

SMALL v. GIBSON.¹

Michaelmas Term, November 27, 1850.

Insurance — Time Policy — Warranty of Seaworthiness.

Assumpsit on a time policy of insurance, commencing on the 25th September, 1843. Plea, that the ship was not, at the commencement of the risk in the policy mentioned, nor at the time of the making of the policy, nor on the 25th September, 1843, seaworthy, or in a fit and proper condition safely to go to sea; but, on the contrary thereof, was wholly unseaworthy:—

Held, after verdict, —

First, that the word "seaworthy" did not necessarily mean that the ship was in a state completely fit for sea navigation, but included in it a fitness for present navigation, either on a sea or river, if about to sail or sailing on either, and a condition of repair and equipment fit for such a port, if she was then in port.

Secondly, that the plea was bad, because in a time policy there is no implied warranty or condition that the ship was seaworthy at the commencement of the risk or term, *wherever she happened to be, or in whatever circumstances she was placed at the time.*

[But, it seems, that in a time policy there may be an implied warranty that the ship is, or shall be, seaworthy for that voyage, if she be then about to sail on a voyage; or that she was in a proper condition for her port, if in port, or if she be at sea, that she was seaworthy when that voyage commenced. — Ed.]

JUDGMENT having been given in the Court of Queen's Bench for the defendant upon the second plea, (see 14 Jur. 368, *ante*, p. 290, where the pleadings are set out,) the plaintiff brought a writ of error, which was argued in last Trinity vacation, (June 13 and 14,) before Parke and Alderson, BB., Maule and Cresswell JJ., Platt, B., and Talfourd, J., by

Martin, for the plaintiff in error, (the plaintiff below.) The plea is bad after verdict, on two grounds. First, in a time policy there is no implied warranty that the ship was seaworthy at the commencement of the risk; the contract is in writing, and the court will not add any condition not expressed in it. Further, the plea is, that the ship was not seaworthy; but a ship which is seaworthy for one voyage is not so for another. According to a time policy, the ship is at liberty to be employed in any adventure which the owner may choose. What is to be the measure or test of seaworthiness? The fact of the ship being unseaworthy at the time of the commencement of the risk for a short time, though it has been sailing under the protection of the policy for months afterwards, does not constitute unseaworthiness. A ship which has lost an anchor, or which is overloaded, or which has insufficient stores, or which is not in all respects properly equipped, is unseaworthy, according to the meaning of that term in a policy of insurance. *Wedderburn v. Bell*, 1 Camp. 1. *Weir*

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v. Aberdeen, 2 B. & Al. 320. *Wilkie v. Geddes*, 3 Dow, 57, 60. *Watt v. Morris*, 1 Dow, 32. *Woolf v. Claggett*, 3 Esp. 258. The general reasoning in the cases upon which the Court of Queen's Bench relied, *Hollingworth v. Brodrick*, 7 Ad. & El. 40, and *Sadler v. Dixon*, 8 M. & W. 895, does not apply where the ship has been absent at sea for any time, and both parties are in ignorance of the state of the ship. The condition sought to be introduced into this policy is unreasonable, the object of a time policy being to have a protection for the ship in whatever venture the ship may be employed; and no custom has been found by the jury which would justify the addition of this condition. *Hucks v. Thornton*, Holt, 30, does not bear on this question. The American courts put seaworthiness on a different footing, by extending the implied warranty beyond the commencement of the voyage; and the underwriter has thorough protection, because concealment of a material fact vitiates the policy.

J. Wilde, contra. The question is, whether a time policy varies from a voyage policy. It must be contended, either that in the case of a time policy no warranty of seaworthiness is implied by law, or that the warranty relates to a different time than in a voyage policy.

[*Alderson*, B. May it not be that the warranty is, that the ship should be seaworthy at the commencement of every fresh voyage which the ship makes during the time?]

I only contend for a warranty of seaworthiness at the beginning of the year. A warranty of seaworthiness is in no case to be collected from the words of the policy. The words "lost or not lost" are to be construed differently, according as the policy covers a by-gone time, or the time from the date of the policy. The underwriters only agree to indemnify against the loss of a vessel assumed to be seaworthy at the time of the contract. Suppose the ship is lost before the 25th of September, on which the year insured commenced, the underwriters would not be liable. "It has been determined that every ship insured must, at the time of the insurance, be able to perform the voyage, unless some external accident should happen; and if she have a latent defect wholly unknown to the parties, that will vacate the contract, and the insurers are discharged." 1 Park Ins. 458, 8th ed., by Hildyard. "In every policy of marine insurance there is an implied warranty that the ship shall be seaworthy for the voyage, by which is meant that she shall be in a fit state, as to repairs, equipments, crew, and all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing on it." Arn. Ins. 652. The term "seaworthiness" is a technical term, and means that the ship is in a fit state, commensurate with the ordinary risks incident to her then position; and, therefore, there are "degrees of seaworthiness"—seaworthiness for the voyage, and "seaworthiness in port." Id. 671. Time policies are referred to in p. 669, and it is said, "In such policies, as in all others, it is quite clear, that the degree of seaworthiness required at the commencement of the risk must be a variable quantity, depending on the nature of the

service or of the voyage on which the ship is intended to be employed during the term."

[*Talfourd, J.* Suppose the ship was in the midst of a tempest on the 25th of September.]

Seaworthiness does not imply that the ship was in a place of safety. If she was properly manned, she would be seaworthy, though in imminent peril; but if she had lost her masts she would not be seaworthy. The question is, whether the contract was not made on a ship which was at the time in a fit state to be the subject of insurance, or whether it was a subsisting wager on the safety of the ship at an antecedent date. First, the knowledge of the owner has nothing to do with the implication which the law makes of a warranty of seaworthiness. [He cited *Lawrence, J.*, in *Christie v. Secretan*, 8 T. R. 192, 197, 198. *Oliver v. Cowley*, before Lord Mansfield, 1 Park Ins. 470, 8th ed., by Hildyard. *Lee v. Beach*, before Lord Mansfield, Id. 468. Lord Eldon in *Watson v. Clark*, 1 Dow, 336, 344. *Parmeter v. Cousins*, 2 Camp. 235, 237.]

[*Alderson, B.* *Watson v. Clark* was a Scotch appeal, in which the court is judge of the fact, and it was held that there was reasonable presumption of the fact.]

Secondly, if the knowledge of the owner is material, the distinction is not between time policies and voyage policies, but between policies which have the commencement of the risk at such a time that the parties cannot know the position and state of the ship, and those in which the owner has the means of knowledge, and of putting the ship in a seaworthy state. There may be the knowledge of the ship being in want of repair without the means of putting it into repair; and the question of warranty would give rise to the discussion of all those matters, as to the means of repair and the like, which now arise upon a question of constructive total loss. Thirdly, the three authorities, *Hucks v. Thornton*, Holt, 30; *Hollingworth v. Brodrick*, 7 Ad. & El. 47; *Dixon v. Sadler*, 5 M. & W. 414; s. c., in error, 8 M. & W. 895, on which the decision of the Court of Queen's Bench was founded, were cases of time policies, and the proposition contended for on the other side was not thought of. The underwriters are exposed to a variety of losses besides those from perils of the seas, in consideration of which the law implies a warranty that the ship is in a state commensurate with the then risk. [He cited *Bishop v. Pentland*, 7 B. & Cr. 219. *Carruthers v. Sydebotham*, 4 Mau. & S. 77. *Phillips v. Barber*, 5 B. & Ald. 161. *Busk v. The Royal Exchange Assurance Company*, 2 B. & Al. 73. *Lawrence v. Aberdeen*, 5 B. & Al. 107. *Fletcher v. Inglis*, 2 B. & Al. 315.] And this is the meaning of the term "seaworthiness." *Forbes v. Wilson*, 1 Park Ins. 472, ed. by Hildyard. Lord Ellenborough, in *Hibbert v. Martin*, Id. 473. *Annen v. Woodman*, 3 Taunt. 299. *Wedderburn v. Bell*, 1 Camp. 1. Bayley, J., in *Busk v. The Royal Exchange Assurance Company*, 2 B. & Al. 73, 83. Fourthly, this plea, which states the unseaworthiness of the ship in the usual form, is a good plea to the action, because it is a plea, that, whatever position the ship was in, she was in a state not insurable.

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[*Parke, B.* Suppose the ship was out at sea, and had just lost a maintopmast.]

The ship would then be unseaworthy, if the maintopmast was proper for her in her then position.

[*Parke, B.* The want of a maintopmast would be unseaworthiness at the beginning of the voyage, but not if it was occasioned by a sudden accident during the voyage, and was repaired as soon after as possible. *Paddock v. The Franklin Insurance Company*, 11 Pick. 227, referred to in Ph. Ins. 329.]

It is there said, that in time policies the general rule would be applied with great liberality. But the unseaworthiness which the jury have found in this case is an insufficient equipment of the ship. The only hardship which results from this construction is, that in some cases, from the length of time during which the ship has been at sea, or from her distance, she is in so uncertain a state that she is not insurable. But if an owner about to insure his ship cannot tell her state, it should be specially provided for in the contract.

[*Cresswell, J.* One contingency is guarded against by the words "lost or not lost."]

As to the underwriters' having the benefit of a concealment, a concealment of matters, except such as render the ship not a proper object of insurance, does not avoid the policy. *Haywood v. Rodgers*, 4 East, 590, 598.

Martin, in reply, referred to the head of an act for better regulating insurances, 2 Magens's Ins., "Ordinances of England concerning Insurances," &c., A. D. 1747, p. 350, No. 1306, by which it was resolved, that the warranty of any fact which might affect the terms of the assurance should be inserted in the assurance before the underwriting or execution thereof.

[*Maule, J.* That was not passed into an act, because, as far as it was good, it was already law.]

The plea cannot have existed before the new rules. *Cur. adv. vult.*

PARKE, B., now delivered the judgment of the court. This case comes before us on a writ of error on a judgment of the Court of Queen's Bench given for the defendant in an action on a policy of assurance on the good ship or vessel called the "*Susan*," lost or not lost, in port or at sea, in all trades and services whatever and where-soever, for twelve calendar months, commencing on the 25th of September, A. D. 1843, and ending the 24th of September, 1844, both inclusive. The policy states the adventure to begin on the ship until she should have arrived at "as above, and moored twenty-four hours in good safety," and the insurance was declared to be 1800*l.* on the ship, valued at 4500*l.* The declaration proceeds to aver a loss by perils of the seas during the risk in the policy mentioned. There was also a count for money had and received.

To this declaration there were several pleas, all of which were found for the plaintiff, except one; that was the second, which was pleaded to the first count. It avers that the ship was not, at the

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commencement of the risk in the policy mentioned, nor at the making of the insurance, nor on the 25th of September, 1843, seaworthy, or in a fit and proper condition safely to go to sea, but, on the contrary thereof, was wholly unseaworthy.

After a verdict for the defendant on this plea, the Court of Queen's Bench gave judgment for the defendant, thinking the plea good. *Ante*, p. 290.

A writ of error was brought, and it was argued before us that the plea was bad in substance, and that judgment ought to have been given for the plaintiff *non obstante veredicto*, on two grounds: first, that in a time policy in the common form, as this is, there is no implied warranty, or, more properly speaking, condition that the ship was seaworthy, or in a fit and proper state according to her then situation, at the *commencement of the risk*, or the first day of the term, which is the same thing; and, secondly, that, assuming there was such an implied condition, the plea was, nevertheless, bad, because it did not negative that the ship was in a fit and proper state according to her then situation, but only that she was not seaworthy, which, it was contended, meant not in a fit state for *sea* navigation.

We do not think there is much difficulty with respect to the latter question, which it will be convenient to dispose of first. It depends on the meaning of the term "seaworthy." If that word means in a state completely fit for *sea* navigation at the time, the plea is certainly bad; for it is enough to satisfy the terms of the assumed implied condition, that the vessel is fit for navigation if at sea, or on a river, or on the point of setting sail on either, or that she is in such a state of physical safety in a port, preparing for a voyage, as to enable her to be in reasonable security till she should be perfectly repaired and equipped for it; and in order to constitute a breach of the condition, both these alternatives must be negatived. But if the word "seaworthy" is not to be construed according to its strict or primary signification only, but in a more extended sense, as including in it a fitness for present navigation, and that either on a sea or river, if about to sail or sailing on either, and a condition of repair and equipment fit for such a port if she was then in port, then the plea is good, for it negatives every part of the assumed implied condition by denying that the vessel was seaworthy. We think that such is now become, in common parlance, as applicable to this subject, the meaning of the term "seaworthy," there being a seaworthiness for the voyage and a seaworthiness for river navigation, or for a port. See the authorities collected in 1 Arn. Ins. 671, and the *dictum* of Story, J., cited in 1 Ph. Ins. 316. And it is to be noticed, that after verdict every intention is to be made in favor of the plea which the language of it will admit. We think, therefore, the plea is good, if there be by law an implied warranty or condition that the ship shall be seaworthy, in the general sense of the word as above explained, *at the commencement of the risk*.

The question then, is—and it is one of great importance—whether there be such an implied condition in the case of a time

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policy. It is unquestionably important as to existing policies, and indeed it is generally, on account of the practical difficulty of departing from the usual course, and introducing alterations into the common form of policy.

The Court of Queen's Bench appears to have been of opinion that there was such an implied condition, on the authority of two decided cases; *Hollingworth v. Brodrick*, 7 Ad. & El. 40, and *Sadler v. Dixon*, 5 M. & W. 405; s. c., in error, 8 M. & W. 898; especially the latter, since which time it considers it as a settled point that there is an implied warranty in time policies, and that the period when it applies is when the risk commences. That decision it thinks justified by the general opinion of lawyers in England and America. It was argued at the bar before us, that neither of these cases decided the latter point—that there was a warranty of seaworthiness *at the commencement of the term*; and we think they do not. In the first case, the plea was, that after the term commenced, and before the loss, the vessel became unseaworthy, and might have been repaired at a reasonable expense, and the ship remained unseaworthy at the time of the loss; and the court decided that plea to be insufficient, being of opinion that a state of unseaworthiness during the voyage could not be a defence, unless, at all events, it was shown to be the cause of the loss; if, indeed, that would make any difference. The case decides nothing as to there being any implied warranty in time policies as a condition precedent to the policy attaching, or as to the time to which that warranty relates. The only part of the case bearing upon the present question is a *dictum* of Patteson, J., in the course of his judgment, that the implied warranty of seaworthiness is satisfied if the ship is seaworthy at the commencement of the risk, and that he does not know of any distinction on account of the risk being for time. Whether there was any such distinction was a question quite foreign to the case. Nor did the case of *Sadler v. Dixon* settle that point. On the contrary, the judgment of the Court of Exchequer expressly states the point to be unsettled, 5 M. & W. 715; and it decided merely that the implied warranty was at least not more extensive than that in a policy on a voyage; and that if there was no contract for the conduct of the crew in one case, there was none in the other. In the Court of Exchequer Chamber this judgment was affirmed. Tindal, C. J., however, uses some expressions which were contended before us to amount to an opinion that the implied warranty of seaworthiness was the same in a time and a voyage policy, and applied to the commencement of the risk; but it is clear, from the context, that no such position was meant to be laid down, but only that the obligation of the assured on a time policy was, after the policy attached, not more extensive than that on a voyage policy, and did not require the assured to *keep* the vessel in a seaworthy state. The period to which the warranty of seaworthiness applied was wholly immaterial in that case.

A third case was cited on which the Court of Queen's Bench do not appear to have acted, viz., that of *Hucks v. Thornton*, Holt, 30, where it was held by Gibbs, C. J., at *nisi prius*, that on a time policy

on a whaling voyage, with a liberty of cruising for prizes, it was enough to satisfy the implied warranty of seaworthiness, if, at the commencement of the time, the ship had a crew fit for one of the purposes, though unfit for the others. It may be inferred from the fact of Gibbs, C. J., leaving that case to the jury, that he thought that there was, in a time policy, an implied warranty or condition of seaworthiness of some sort *at the commencement of the term for which the ship was insured*. But the facts may not have made it necessary for him to give that question much consideration, as the plaintiff was likely to succeed even if there was such a warranty; and, at all events, it was no more than a *nisi prius* opinion, and as the propriety of it could not be questioned by a motion for a new trial, it is of less weight.

Looking at the state of the decisions, therefore, they do not by any means settle the question; and with respect to the supposed prevailing opinion both in England and America, we are not aware that it is as the Court of Queen's Bench have supposed. We do not know of such a prevailing opinion in the profession, and so far as we can collect from the text writers, we do not find it considered as a settled point by them. • Mr. Arnould, in his work on Insurance, intimates his notion that the implied warranty is, that the ship should be seaworthy when she sails under the policy for the voyage or course of navigation on which it is contemplated to employ her during the term; and what that voyage is, is a matter of evidence. This is not the same proposition as that the vessel must be seaworthy at the moment the term commences, wherever she may be. Mr. Phillips, in his *Treatise on Insurance*, 328, does not appear to think this is a settled point in America; he refers to the opinion of Chief Justice Shaw of Massachusetts, who says, whether the rule of seaworthiness would apply where the ship had been on a long voyage was a matter of doubt, and if it did, it must be understood with great latitude. *Paddock v. The Franklin Insurance Company*, 11 Pick. 227. We cannot help thinking, therefore, that the present question is as yet unsettled, and that we are still at liberty to consider what the decision ought to be upon principle.

With respect to a policy on a voyage, there is not the least question but that there is an implied warranty of seaworthiness at the commencement of the risk; that is, at the port, when the assurance is "at and from," at the beginning of the voyage, when it is "from" a port; and it is also clear that it is not a mere warranty, but a condition, on failure of which the policy is void, whether the unseaworthiness causes the loss or not. On what is this implied warranty founded? The late Lord Abinger used to say (not judicially) that the warranty was implied from the use of the term "good" in the policy, which implied an agreement that the ship was good at the time mentioned in the policy. If this observation be just, the question in this case would be determined, for that term is used in the present policy, and the ship is thereby impliedly warranted to be good on the 25th of September, 1843. But we cannot think that the observation is well founded. If it was, there would be no implied

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warranty in an insurance at and from a port if the word "good" were omitted. The term "good" is a merely commendatory expression, and it is going very far to say that it means not only that the vessel is tight, staunch, and sufficiently found in stores, &c., but is provided also with a competent master and crew.

Further, no trace can be found, that we are aware of, of such a doctrine as that attributed to Lord Abinger, in any reported case. Mr. Hildyard, in his *Treatise on the Principles of the Law of Marine Insurance*, 95, in commenting on the different parts of the policy, considers the term "good" to imply seaworthiness, without citing any authority for it. The contrary doctrine is expressly stated in a work on Insurance by an eminent American jurist, Mr. J. Duer, who, at p. 671, says, that the implied warranty does not depend on the terms of the policy; and we concur in that opinion. In a contract of insurance for a voyage, the warranty or condition made with the assured, that the ship is seaworthy at the commencement of the risk, appears to be implied from the very nature of the contract, which rests on the supposition that its basis is the seaworthiness of the vessel at that time; so other conditions are equally implied, such as not to deviate from the usual course of the voyage, 1 Ph. Ins. 806; to commence it at a reasonable time, *Mount v. Larkins*, 8 Bing. 108; to disclose all material circumstances, see Duer, Ins.; and the non-performance of these conditions avoids the policy, whether it arises from fraudulent motives or not. The contract of insurance is, in case of a voyage, that the owner of a ship which is reasonably capable, per Lawrence, J., in *Christie v. Secretan*, 8 T. R. 192, 198, of performing the voyage, shall be indemnified against certain contingencies in the course of it; and if the consideration fails, the obligation fails; and the principle is, no doubt, most important for the preservation of human life and the benefit of commerce, as otherwise the tendency of insurance would be to render those whom the policy protected careless about the safety of the ship and the crew. Lord Eldon, in *Douglas v. Scougall*, 4 Dow, 269, 276. Lord Redesdale, in *Wilkie v. Geddes*, 3 Dow, 57, 60. This condition is highly reasonable in case of a voyage, when the assured knows the situation of his ship, and is capable, by himself or his agent, of performing the condition, by putting the ship into a state of proper repair and fitness for the voyage; and it is very salutary, for it imposes on him the obligation to take care, to the utmost of his power, to put the vessel in every respect into a seaworthy state. This proposition is very clear, and it is undoubted law that there is an implied warranty, with respect to a policy for a voyage, that the ship should be seaworthy at the commencement of the voyage, or in port when preparing for it, or had been seaworthy when the voyage had commenced, if the insurance is on a vessel already at sea, which, being commensurate with the risk insured, is compendiously described as a warranty of seaworthiness at the commencement of the risk; and that led to the supposition that there is always such a warranty.

But does the law imply a warranty or condition that the ship shall be seaworthy, in the case of a time policy, at the commencement of

the risk — that is, of the term — irrespective of the commencement of the voyage, or the preparation for it, and wherever the ship may happen to be? This is a very different proposition; and we are of opinion, after much consideration, that there is no *such* warranty implied by law. As there is no decision or sufficient authority to that effect, it can only be implied by analogy to the case of a voyage policy, and as falling within the same principle; but there is no such analogy, and the cases are very different. In the case of a time policy, the assured does not necessarily know the condition of the ship at the commencement of the term; she may be at sea in good or bad condition; and if at sea, no care or expense on the part of the assured or his agent could secure her being seaworthy then; the sudden loss of a yard or sail or anchor might have taken place, without the possibility of the assured having been able to replace it. She might have met with sea damage, which it had been impossible to repair; she might have lost two or three of her crew by a malignant fever — circumstances which render the case essentially different from an insurance on a voyage, where it is always competent for the assured or his agents to put the vessel into a seaworthy state when the policy attaches. It is very reasonable to hold that, in the latter case, the assured warrants the seaworthiness of the ship which he is presumed to be capable of securing; in the former case it is unreasonable to make him responsible, under all circumstances, for the seaworthiness of the ship, which, under many circumstances, he could not possibly effect. It is a strong argument against any implication of a warranty, that the thing warranted is not within the power of the party supposed to warrant. The second case being essentially different, it appears to us that it does not follow that because the rule of law in the one case is, that there is a warranty of seaworthiness at the commencement of the risk, that being the commencement of the voyage or preparation for it, there ought to be in the other a warranty of seaworthiness at the commencement of the risk, when it is unconnected altogether with the commencement of the voyage. That is sufficient for the determination of the present question; for the plea is founded on the supposition that there is, by law, a warranty of seaworthiness, under all circumstances, on the first day of the term, or at the date of the policy. We think, for the reasons now given, that there is none at the commencement of the term, wherever the ship may be; and the same reason applies to the supposed warranty at the date of the policy. Indeed, as this policy is “lost or not lost,” the latter is out of the question.

We are far from saying that there is no warranty of seaworthiness at all — so to hold would be to let in the mischief which the law provides against by the implied warranty in a voyage policy — or that there is not the same warranty in the case of a time policy, according to the situation in which the ship may be at the commencement of the term of the insurance; that is, that the ship is or shall be seaworthy for that voyage, if the ship then be about to sail on a voyage; if in port, that she was in a proper condition for such a port; if she be at sea, that she was seaworthy when the voyage commenced; in short,

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that the obligation on the assured is just the same in the time policy as if the service in which the vessel was, or was intended to be engaged, or might be engaged, during the term, was inserted in the policy. If, then, a ship were insured in terms, from a given day, for the remainder of the then voyage to a foreign port and back to England, until another given day, there may be a warranty of seaworthiness when the voyage commenced. Nor is it necessary, indeed, to say that there is not in a time policy a warranty of seaworthiness at the commencement of the risk, so far as lay in the power of the assured to effect it; so that if the ship had met with damage before, and could have been repaired by the exercise of reasonable care and pains, and was not, the policy would not attach. All we propose to decide, and all that is necessary for the decision of this case, is, that there is no warranty of seaworthiness, wherever the ship may be, or in whatever circumstances placed, at the commencement of the term insured. We think that the warranty cannot be more extensive than it is under a voyage policy, and imposes no further obligation on the assured than he is capable of performing.

In order to obviate the supposition that this doctrine would lead to fraud on the part of the assured, it may be observed, that if any one were to effect an insurance on a vessel, knowing that she was on a voyage, and was in an unseaworthy state at the commencement of it, the policy would be void, because that would be concealment of material facts, and a breach of the implied condition on which all policies are effected. No such question arises in the present case.

It is also fit to be observed, that, quite independently of any question as to implied warranty, the ship insured by a time policy must exist as a ship at the commencement of the term, for the indemnity is only against accidents that happen after it.

We are of opinion that the plea in this case is in substance bad, and that the plaintiff is entitled to judgment *non obstante veredicto*; therefore we think the judgment of the Court of Queen's Bench must be reversed, and judgment given by this court.

*Judgment reversed, and entered for plaintiff, non obstante veredicto, for 55l. damages, assessed contingently at the trial.*¹

¹ The principal question taken in this case does not appear to have been decided in the American courts. In the *American Insurance Company v. Ogden and McComb*, 20 Wendell, 287, (1838,) the question was raised whether the same principle which applies to a voyage policy, viz., that there was an implied warranty or condition, that the vessel was seaworthy only at the commencement of the risk, governed an insurance upon a time policy. The insurance company contended, that a time policy was in the nature of a separate insurance upon each and every voyage or

passage undertaken during the continuance of the risk; and that the underwriter is not liable upon such a policy, if the vessel is not seaworthy at the time of her departure from each port or place of her business during the continuance of the risk. And the court, assuming that there was in such policy an implied warranty of seaworthiness, held, that it was sufficiently complied with, if the vessel was in an unexceptionable condition at the commencement of the risk. See, also, *Brooks v. The Oriental Insurance Company*, 7 Pickering, 259, (1828.)

Halford v. Cameron's Coalbrook Steam Coal, &c., Railway Company.

HALFORD v. CAMERON'S COALBROOK STEAM COAL AND SWANSEA AND LOUGHOR RAILWAY COMPANY.¹

Hilary Term, January 22, 1851.

Company — Bill of Exchange — Acceptance on Behalf of Company —
7 & 8 Vict. c. 110, s. 45.

A bill of exchange drawn upon a completely registered joint-stock company by its corporate name, was accepted as follows: "Accepted, J. B. and E. N., directors of the C. Company, appointed to accept this bill." J. B. and E. N. were, in fact, directors of the company. The corporate seal, having the name of the company inscribed, was also affixed to the bill, and it was countersigned by the secretary:—

Held, that the bill of exchange was sufficiently expressed to be accepted by J. B. and E. N. on behalf of the company within 7 & 8 Vict. c. 110. s. 45.

ASSUMPSIT on a bill of exchange for 203*l.* drawn by the plaintiff upon and accepted by the defendants, payable three months after date.

Pleas — That the defendants did not accept. Issue thereon.

At the trial, before Erle, J., at the sittings in Middlesex, during the present term, it appeared that the defendants were a joint-stock company, completely registered under 7 & 8 Vict. c. 110, and that the bill of exchange upon which the action was brought was drawn upon the company by their corporate name, and purported to be accepted as follows: "Accepted, John Barham and Edmund Norcott, directors of Cameron's Steam Coal and Swansea and Loughor Railway Company, *appointed to accept this bill.*" The common seal of the company, having its corporate name inscribed upon it, was also affixed to the bill, and the name of the secretary was countersigned. It was found that Mr. Barham and Mr. Norcott were two of the directors of the company. For the defendant it was objected that this acceptance was not binding upon the company under 7 & 8 Vict. c. 110, s. 45, which requires that all bills of exchange shall be accepted by and in the names of two of the directors of the company on whose behalf they are accepted, and shall by such directors be expressed to be accepted by them on behalf of such company. The learned judge reserved leave to the defendants to move to enter a nonsuit on this objection, and the plaintiff had a verdict for 203*l.*

On a former day in the term,²—

Montague Smith moved accordingly, and stated that in a precisely similar case of *Edwards v. Cameron's Coalbrook Steam Coal and Swansea and Loughor Railway Company*,³ the Court of Exchequer had granted a rule, which was then pending, on the same objection.

¹ 20 Law J. Rep. (N. S.) Q. B. 160. 15 Jur. 335.

² January 16, before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and ERLE, JJ.

³ This rule was argued before the Court of Exchequer at the sittings in banc, after the present term, when the court discharged the rule upon the authority of the present case.

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He also contended that it should be expressly stated, or, at least, necessarily implied, upon the face of the bill itself, that it was accepted on behalf of the company.

Cur. adv. vult.

LORD CAMPBELL, C. J. Having taken time to consider the motion for a rule to set aside the verdict for the plaintiff in this case, having had an opportunity of inspecting the bills of exchange on which the action is brought, and having attentively compared the form of the acceptance with the requisitions of the act of Parliament on which the objection is founded, we are of opinion that no rule ought to be granted. However unconscientious the objection may be, and whatever facility to fraud might arise from effect being given to it, still it must prevail if the bills are not accepted substantially as the legislature has directed. Although there are no words of nullification, the meaning of the enactment must be taken to be, that companies of the description therein mentioned shall only be liable as acceptors of a bill of exchange where the bill has been accepted by and in the names of two of the directors of the company on whose behalf it is accepted, they expressing that "it is accepted by them on behalf of such company." But we think that there is no necessity for the very words and syllables here mentioned to be written by the two directors on the face of the bill. According to Dr. Johnson, the meaning of the verb "to express" is, "to represent in words; to exhibit by language; to show or make known in any manner." Now, do not the two directors who have accepted these bills represent in words, exhibit by language, show and make known, that the bills are accepted by them as directors on behalf of the company? The bills are drawn on the company by its corporate name, they are sealed with the corporate seal, having the corporate name of the company circumscribed, and they are countersigned by the secretary to the company, who so describes himself. Then the two directors write upon the bill "accepted," sign their names under that word, and add, "Directors of Cameron's Coalbrook Steam Coal and Swansea and Loughor Railway Company, appointed to accept this bill." Can it be reasonably contended that this bill is not by such "directors expressed to be accepted by them on behalf of such company"? By whom are they represented to be appointed to accept the bill? Unquestionably by the company, who are the drawees. Do not the directors represent that they act under that appointment? Is not this a representation by them that the bill is "accepted by them on behalf of the company"?

We should not have considered it necessary to say so much upon the subject, had we not been informed that another court, in a similar case, had granted a rule to show cause why the verdict should not be set aside. We entertain the most sincere respect for the doubts of that court; but, none of us entertaining any doubt ourselves, we think we cannot, with propriety, grant a rule which might for a considerable time prevent the plaintiff from enforcing payment of a just demand.

Rule refused.

Moss v. Sweet.

MOSS v. SWEET.¹

Hilary Term, January 15, 1851.

Goods sold and delivered — Sale or Return.

Where goods are sold under a contract of "sale or return," they pass to the purchaser subject to an option in him to return them within a reasonable time, and if he fails to exercise that option within a reasonable time, the price of the goods may be recovered, as upon an absolute sale, in an action for goods sold and delivered.

[*Lyons v. Barnes*, 2 Starkie, 39, and *Iley v. Frankenstein*, 8 Scott, N. R. 839, doubted. — Ed.]

ASSUMPSIT for goods sold and delivered.

Plea — *Non assumpsit*.

At the trial, before Lord Campbell, C. J., at the sittings at Guildhall, after last term, it appeared that the goods in question had been sold by the plaintiff to the defendant on sale or return, which was explained by a witness to mean generally that the goods were sold to the purchaser with an option to him of returning them within a reasonable time.

The defendant had not bought the goods on his own account, but for the purpose of selling again, and it was proved that, according to the contract between the parties, the defendant, if he had returned the goods to the plaintiff, would have accounted only for the invoice price at which they were sold to him. The defendant had sold a portion of the goods to other persons. The jury returned a verdict for the plaintiff, with 25l. 12s. damages.

Wordsworth now moved for a new trial, on the ground of misdirection. The action for goods sold and delivered will not lie, as there was no absolute contract of sale. *Iley v. Frankenstein*, 8 Sc. N. R. 839, is directly to that effect; and *Beverley v. The Lincoln Gas Light and Coke Company*, 6 Ad. & E. 829; s. c. 7 Law J. Rep. (N. S.) Q. B. 113, and *Bianchi v. Nash*, 1 Mee. & W. 545; s. c. 5 Law J. Rep. (N. S.) Exch. 252, were both cited there and distinguished. In *Lyons v. Barnes*, 2 Stark. 39, where beer was sold in casks to the defendant, and notice was given to him that unless he returned the casks in a fortnight he would be considered to have purchased them, Lord Ellenborough held, that an action for goods sold and delivered would not lie for the casks; they were delivered under a special agreement which should have been declared upon.

PATTESON, J. The jury found that by this contract the goods were delivered on sale or return; that is, that they were sold to the defendant with an option to him of returning them within a reasonable time, of which he did not avail himself. That being so, the action will lie for goods sold and delivered. This is the result of all the authorities, except that in the Common Pleas. It is so laid down in *Bailey v. Gouldsmith*, Peake, N. P. 56, by Lord Kenyon. *Lyons v. Barnes* I do not think is very good law. Then, as to *Iley v. Frankenstein*, I cannot help thinking there must be something strange in that

¹ 20 Law J. Rep. (N. S.) Q. B. 167.

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case. The court treat it as if the goods delivered on sale or return were to be returned at the option of the seller, and they seem to have thought the action should be for not returning the goods. I think there must have been something peculiar in the contract there, for it is contrary to all my notions of sale or return, which is, that there is a sale to the purchaser, who is to keep the goods unless he chooses to return them within a reasonable time. Therefore the direction of my lord and the verdict of the jury were quite right.

COLERIDGE, J. When the goods pass from one party to another under a contract of sale on a condition, when the condition is performed the seller may declare as upon an absolute sale. Here the condition is, that the buyer may return the goods within a reasonable time at his option. It is established by *Bailey v. Gouldsmith* and *Beverley v. The Lincoln Gas Light and Coke Company* that such is the meaning of the term "sale or return." Then, was the condition here performed? If any question had been made as to the lapse of more than a reasonable time, that would have been put to the jury; but no such point was made, and indeed it could not have been raised, as it appears many of the goods were sold again by the defendant. Therefore, consistently with the principle of the authorities, what was done was quite right. I admit that *Iley v. Frankenstein* is difficult to reconcile with the previous current of decisions, but I think there must be some misunderstanding about that case.

WIGHTMAN, J. The current of authorities has established that this contract means that the goods are sold absolutely unless the buyer returns them within a reasonable time. No doubt has been thrown on any of the cases as to the meaning of such a transfer; and from its terms one would understand such to be its meaning. Here it was part of the defendant's case that the goods were sold on sale or return, and on the authority of *Iley v. Frankenstein* the objection was taken that the action would not lie. The question whether a reasonable time had elapsed was never asked to be left to the jury. It was taken as a matter of law that on such a contract an action for goods sold and delivered would not lie. As to that case, if the facts were as appears on the report of it, I cannot understand it, but I think there must be some mistake.

LORD CAMPBELL, C. J. In this case I had so little doubt that I granted a certificate for immediate execution, and having now heard the defendant's counsel I certainly retain my opinion that when goods are supplied on sale or return it is a sale unless they are returned within a reasonable time; if they are not so returned, the option of determining the sale is gone, and the vendor may maintain an action for goods sold and delivered.

*Rule refused.*¹

¹ So where goods are sold to be paid for in an approved indorsed note at six months, and the purchaser after receiving the goods

refuses to give the note upon demand made, it has been held, that the seller may treat the sale as an absolute one, without credit, and

bring assumpsit for goods sold and delivered without delay; the sale being considered a cash sale, unless the buyer should give the security, on which condition alone the credit was given, and the goods delivered. *Corties v. Gardner*, 2 Hall, 345, (1829.)

But in *Allen v. Ford*, 19 Pickering, 217, (1837,) where goods were sold on a credit of six months, the purchaser agreeing to give the security of a third person for the payment, which condition he failed to perform, the Supreme Court of Massachusetts held, that the vendor could not bring assumpsit for goods sold and delivered, before the time of credit had elapsed. See also *Ferguson v. Carrington*, 9 Barnwell and Cresswell, 59, (1829.) *Strutt v. Smith*, 1 Crompton, Meeson and Roscoe, 315, (1834.) *Galloway v. Holmes*, 1 Douglass, (Michigan,) 330, (1844.)

Somewhat analogous to the contract of "sale or return" in England, is a contract among us by which manufacturers of certain articles deliver large quantities thereof at the same time to retailers, who, upon settlement with the manufacturer, pay him for what has been sold, with a privilege of returning the remainder. In such cases, the property so delivered does not become the retailer's, and cannot be attached by his creditors. *Meldrum v. Snow*, 9 Pickering, 441, (1830.) *Blood v. Palmer*, 11 Maine, 414, (1834.) *Moss v. Stone*, 5 Barbour, 516, (1849.) In such case, the person receiving the property is considered as a factor or agent for the other party; and assumpsit for goods sold and delivered will not lie against such person, although he has himself disposed of the goods, and unreasonably refused to account for the proceeds. *Selden v. Beale*, 3 Greenleaf, 178, (1824.) *Ayers v. Steeper*, 7 Metcalf, 45, (1843.)

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But ordinarily, in the absence of any such relation as that of principal and agent, if the owner of a chattel delivers it to another, and takes his promise to return the same on a day specified or pay a sum of money therefor, the property in the chattel passes to the latter at the time of delivery, and he may sell the same, and pass the property as against the former owner, even before the time specified for its return has elapsed. *Dearborn v. Turner*, 16 Maine, 17, (1839.) But in contracts of sale upon condition, as that the property shall not become the vendee's until the price is paid, or until some security for the payment is given, or until some other condition is performed, here, although the property is delivered, yet the title does not pass to the vendee, so that it can be attached by his creditors, until the price is paid, or the required condition is performed, or its performance waived. *Tibbets v. Towle*, 12 Maine, 341, (1835.) *Manwell v. Briggs*, 17 Vermont, 176, (1845.) *Whitwell v. Vincent*, 4 Pickering, 449, (1827.) The performance of the condition may, however, be impliedly waived, and where the goods have been delivered subsequent to the sale, without a demand of the performance of the condition which was then due and to be performed, this has been held to be a waiver of its performance, and the title becomes perfect in the purchaser. *Carlton v. Sumner*, 4 Pickering, 516, (1827.) *Smith v. Denie*, 6 Pickering, 262, (1828.) *Powell v. Bradlee*, 9 Gill & Johnson, 220, (1837.) But a mere mental determination on the part of the vendor to rest satisfied with the non-performance of the condition, but which was not procured by the vendee, nor notified to him, has been said not to be a waiver of such condition, so as to vest the property sold in the vendee. *Manwell v. Briggs*, 17 Vermont, 176, (1845.)

Regina v. The Overseers of Manchester.

REGINA v. THE OVERSEERS OF MANCHESTER.¹

Hilary Term, January 28, 1851.

Rate — Exemption from Poor Rate — "Royal Manchester Institution" — Purposes of "Science, Literature," &c. — 6 & 7 Vict. c. 36 — Pecuniary Profit — Application to general Purposes — Division of Funds after Dissolution.

The building of the Royal Manchester Institution was erected by the subscriptions of shareholders, and vested in trustees, upon trust to permit it to be used for the purposes of literature, science, and the fine arts; lectures were given there on literary and scientific subjects, to which strangers were admitted gratuitously on application to the council. At the meetings, literary and scientific papers were read, the reader having the power to invite twenty friends, and the leading literary and scientific persons in the neighborhood having free admission. Rooms in the institution were devoted to the exhibition of paintings, and artists were assisted in the sale of their works without any view to profit on the part of the society. There was likewise a museum for antiquities and specimens of natural history. The expense was chiefly defrayed by the subscription of the members. This being *prima facie* a society exempted from liability to be rated, within stat. 6 & 7 Vict. c. 36:—

Held, that it was no objection either,—

1. That part of the building was let to tenants, exemption not being claimed for that part, and the rents received from the tenants forming part of and being applied as the general funds of the society; or,—
2. That the society deducted 5*l.* per cent. on the price of paintings sold at the exhibition which came from a distance, the percentage being applied to, but not sufficing to defray, the expense of the carriage of those paintings, which was paid by the society; or,—
3. That strangers were admitted to the exhibition of paintings on payment of a small fee, that being applied to the purposes of the society; or,—
4. That the deed of settlement declared that the building was to be used for the exhibition of works of art, &c., for the delivery of lectures on subjects of science, literature, or the arts, "and otherwise for the imparting and diffusing of education and knowledge consistent with the general purposes of the institution," because such declaration did not authorize any other purposes than those of science, literature, and the fine arts; or,—

Lastly, that the deed of settlement declared, that upon a dissolution of the society, the property belonging to it was to be sold, and the proceeds, after payment of debts, to be divided among the members, because such declaration only expressed a power which implicitly belonged to the members, and it did not appear to have been inserted with any view of profit.

THIS was an appeal against a rate for the relief of the poor of the township of Manchester.

Upon the trial of the appeal before the recorder of the borough of Manchester, it was ordered by the court that the rate should be amended, by striking out of it the whole of the assessment numbered therein 3875, subject to the following case:—

¹ 20 Law J. Rep. (N. S.) M. C. 113. 15 Jur. 219.

² Which enacts, "That no person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay to any county, borough, parochial, or other local rates or cesses, in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division or bonus in money unto or between any of its members; and provided, also, that such society shall obtain the certificate of the barrister at law or lord advocate, as hereinafter mentioned."

The premises rated under the above assessment were part of a building situate within the township of Manchester, called "The Royal Manchester Institution," for which the appellants were to be deemed the occupiers and persons liable to be rated, if the premises were ratable. The assessment appealed against was set out. The fifth only material ground of appeal was that the appellants were, in and by the provisions of an act passed in the seventh year of her present majesty, entitled "An Act to exempt from county, borough and parochial and other local rates, land and buildings occupied by scientific or literary societies," exempted from being assessed or rated in respect of the said part of the Royal Institution numbered in the said rate 3875, because the said part, before and at the time of the making, allowance and publication of the rate, and from thence hitherto, belonged to a certain society, as owners, instituted for purposes of science, literature, or the fine arts exclusively, within the meaning of the said statute, namely, to a society called "The Royal Manchester Institution," the said part being during all the time aforesaid occupied by the said society, for the transaction of its business and for carrying into effect its purposes, and being supported in part by annual voluntary contributions, and never having made, and by its laws during all the time aforesaid not being able to make, any gift, division, or bonus in money, unto or between any of its members; and having, in manner and form directed and required by the said statute, duly, before the making of the said rate, obtained the certificate and certificates of the barrister at law appointed to certify the rules of friendly societies, and having in all respects complied with and performed all matters and things provided and required by the said statute, or otherwise, so as to entitle the said society and the appellants to be exempted from the rate in respect of the said part of the Royal Institution, numbered in the rate 3875.

It was admitted upon the trial that the rate, except as to the liability of the property to be rated, was duly made, signed, allowed, and published. That the rules, laws, and regulations of the Royal Institution had been duly submitted to the barrister appointed for that purpose, who had duly certified that the society was entitled to the benefit of the 6 & 7 Vict. c. 36, and that a copy of such rules, &c., had been transmitted by the said barrister to the clerk of the peace of the said borough, and allowed by the recorder, and duly filed with the rolls of the sessions. That the Royal Institution had been built by the society from funds subscribed by a number of shareholders, and that the property was vested in trustees upon trust to permit the same to be used for certain purposes connected with literature, science, and the fine arts. That the society let off rooms in the building, and cellars under the same, to tenants, for certain rents and purposes which were specified in the case, and such tenants were rated separately by the respondents. That the rents received from the tenants formed part of and were applied to the general funds of the society, which were also in part derived from contributions, as mentioned in the rules. That the institution was occupied by the said society, and used by it for carrying out the following purposes:

Lectures were given there upon literary and scientific subjects, to which the members had free admittance; and officers, literary and scientific persons, artists, and strangers were admitted gratuitously on application to the council. That the lectures were paid for by the society or delivered gratuitously. That the lecture theatre had occasionally been lent or let to other societies, but not since the rules of the society filed as aforesaid had been certified. The *conversazioni*, *soirées*, or other meetings of the members were held on certain evenings during the winter months, to which the person reading the paper could invite twenty friends, and the chairman of the meeting ten friends, and the leading literary and scientific persons of the neighborhood had free admission. That exhibitions of paintings and works of art were annually or more frequently held, to which members were admitted free and strangers on payment of an entrance fee. The carriage of the paintings to and from the exhibition was paid by the society. But for those paintings coming from a distance, which might be sold at the exhibition, the society deducted 5*l.* per cent. on the price at which the paintings were sold, to defray the expenses of carriage, (no deduction being made from the price of paintings by local artists.) This percentage was paid into the general fund, but did not amount to the expenses of carriage. That books, containing the names and addresses of the artists, and the prices of their paintings, were also placed in the exhibition room during the exhibition of paintings, and the officer of the institution in attendance had permission, upon which he occasionally acted, to sell the same on behalf of the artists at the prices fixed by them, and to mark the pictures as sold. An officer of the society received the purchase money of pictures so sold, and handed the same to the artists, after deducting the percentage above mentioned. That the artists occasionally sold their pictures themselves during the continuance of the exhibition, and pictures sold before the opening of the exhibition were frequently exhibited, as well as pictures not intended for sale. That no rate laid since the passing of 6 & 7 Vict. c. 36, had been paid in respect of the institution, nor any attempt made to enforce the same.

By the deed of settlement of the institution, dated the 26th of February, 1832, it appeared that two plots of land had been purchased for 721*l.* and 3000*l.*, subject to several reserved rents, amounting together to 113*l.* 10*s.* 1*½d.* *per annum*, and it declared and provided that the trustees should be seized and possessed of the institution, upon trust to permit the same at all times until the same should be sold or disposed of under the trusts thereafter expressed, to be used and employed as a museum, or place of exhibition for works of art and science, antiquities and specimens of natural history, and for the delivery of public lectures on subjects of science, literature, or the arts, and otherwise for the imparting and diffusing of education and knowledge consistent with the general purposes of the said institution; and to be in all respects conducted and managed as the council for the time being should direct, subject, nevertheless, and according to the regulations of the institution for the time being. The deed

also provided, that the trustees, in case the institution should be duly dissolved in the manner required by the regulations for the time being, should, within three months after notice of such dissolution from the council, with their written request, sell and dispose of the said plots of land, buildings, and hereditaments belonging to the institution, and after payment of the costs and charges of the sale, pay the residue of the money arising therefrom to the council, to be by them applied to and amongst the persons who at the time of such dissolution were hereditary and life governors of the institution, the share of each hereditary governor bearing to the share of each life governor the proportion of three to two. A power was also given by the deed to the trustees, according to the written request and direction of the council, from time to time to lease and demise any part of the said hereditaments and premises which might not be deemed requisite for the purposes of the institution, for such other purposes, for such term or terms of years, in consideration of such rents, and upon and subject to such terms and provisions as the council might direct.

By the deed of settlement of the personal estate of the institution, dated the 26th of December, 1832, it appeared, that on the formation of the institution, certain regulations were agreed upon for the better management thereof, and other regulations, either altering or repealing certain of the original regulations, or in addition thereto or substitution thereof, had been since agreed upon; and that the then existing rules were specified in a schedule thereunto annexed. Also, that a permanent fund had been raised and vested in trustees for the said institution, who had appropriated to the erection of the building 7280*l.* 8*s.* 9*d.*, being part of the said funds in their hands. It further contained provisions for appropriating and paying part of certain subscriptions and payments, imposed and made payable on the admission of hereditary and life governors, to the trustees, to maintain and increase the said fund until it should amount to 10,000*l.*, including the said sum of 7280*l.* 8*s.* 9*d.* And also similar provisions to those contained in the said deed of settlement of the real estate, for the sale and conversion into money of the said personal estate and effects of the institution, and the division of the moneys arising therefrom in case of a dissolution, among the then hereditary and life governors. By the regulations in the said schedule it was provided, that any new or additional regulations for the management of the institution might be made, and the existing regulations for the time being, or any of them, except that respecting the dissolution of the institution, be repealed and altered, provided the same were done with the consent of three fourths of the governors present at each of two special general meetings duly convened. That such meeting might be convened at any time by any six or more of the council when they thought fit, by advertisement in each of the Manchester newspapers, not less than fourteen nor more than twenty-eight days previously to its being held, declaring the specific object of the meeting.

The rules provided, amongst other things, that such of the present hereditary governors as paid their original subscriptions of forty

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guineas on or before the 17th of May, 1827, and had not declared their assent to the payment of the annual subscription, or the sum of 20*l.* in lieu thereof, should be exempted from payment thereof; but such of them who should thereafter declare his or her assent to such payment should thenceforth cease to be exempted, and not be entitled thereafter to discontinue the payment of the said annual subscription, except on paying the sum of 20*l.*, as mentioned in the second regulation. That every hereditary governor might transfer his or her share and privileges, rights and interests, provided that on every transfer the sum of 10*l.* 10*s.* were paid to the funds of the institution. But that no transfer should be made by any hereditary governor who withheld his assent to the payment of the annual subscription, or the sum of 20*l.* in lieu thereof, unless the party to whom it was proposed to transfer first gave his or her assent to such payment. That every hereditary governor liable to pay the annual subscription, and who was in arrear one year, should be suspended from his privileges as governor, and if five years in arrear, should forfeit all his privileges, rights, and interests, and absolutely cease to be a governor. That every annual governor, whose annual subscription was in arrear three calendar months, should be suspended from his privileges, and pay a fine of 5*s.*, and the like sum in addition for every succeeding three months until payment of the subscription; and if unpaid for one year, the name of such governor should be struck out from the list of governors, and all his privileges forfeited. That all the funds and moneys of the institution should, during the subsistence thereof, be applied by the council in paying the debts owing by the institution, and in carrying out the purposes thereof, namely, the promotion of literature, science and the arts, in such manner as the council thought proper; but no dividend, gift or bonus in money should at any time, or under any circumstances, be made to or between the governors or members of the institution.¹

It did not appear that any dividend, gift, division, or bonus in money had ever been declared, or made to or between any of the members of the society, except as aforesaid.

If the court should be of opinion that the appellants had established their claim to be exempted under the provisions of the 6 & 7 Vict. c. 36, from liability to be rated, the order of sessions amending the rate was to be confirmed, and the rate amended accordingly, otherwise the order of sessions was to be set aside, and the rate confirmed.

¹ The 16th rule also provided, that any new and additional regulations for the management of the institution might from time to time be made, and the existing regulations for the time being, or any of them, except the regulations respecting the dissolution of the institution, be repealed, and altered, with the concurrence of three fourths of the governors present at each of two special general meetings, with an interval of not less than one calendar month, nor more than four calendar months, between such meetings.

By the 17th rule, the company might be dissolved, with the consent of three fourths of the governors for the time being, expressed in writing, at two successive special general meetings duly convened as therein specified; and this regulation was not to be altered or repealed, except with the same consent expressed in the same manner.

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Crompton and *Holland*, (January 18,) in support of the order of sessions. The Royal Manchester Institution is occupied by the society exclusively for purposes of science, literature, and the fine arts, within the meaning of the 6 & 7 Vict. c. 36, s. 1, and is not within the latter terms of the proviso to that section. One question raised at the sessions was, that the society was ratable because part of the premises were let at a rent; but that does not alter the case, as the rest of the building is applied to the purposes specified in the act.

[*Coleridge*, J. That question could only be material as showing that the purposes of the society were not exclusively scientific.]

The rents received are applied to and form part of the funds of the society. The deed provides for a library and for scientific purposes, and there is no statement that the rents were ever applied otherwise. The entrance fee payable by strangers to see pictures does not affect the institution, so as to make it less for the purposes of literature, science, and the fine arts. Those who pay are for the time members.

[*Wightman*, J. The society gets a percentage on pictures sold.]

That is merely a mode of repaying the carriage of pictures, and it does not amount to the expense incurred.

[*Lord Campbell*, C. J. *Pro tanto* it may make the society brokers for the sale of pictures on commission.

Wightman, J. But it is within the exemption, if the society is partly supported by voluntary contributions. The question is, whether it is substantially for scientific purposes.]

In the case of *The Queen v. Shee*, 4 Q. B. Rep. 2; s. c. 12 Law J. Rep. (N. S.) M. C. 53, which turned on the question of beneficial occupation, it was held, that the society of the Royal Academy was not ratable for the exhibition rooms in the National Gallery.

[*Coleridge*, J. Here you must show that the premises are instituted and occupied exclusively for purposes of science, literature, or the fine arts.]

The cases of *Purvis v. Traill*, 3 Exch. Rep. 344; s. c. 18 Law J. Rep. (N. S.) M. C. 57; and *Ex parte the Overseers of Birmingham, in re the Birmingham New Library*, 10 Q. B. Rep. 868; s. c. 18 Law J. Rep. (N. S.) M. C. 89, lay down the principle on which the act should be construed; and tested by that principle, this society ought to be exempt. It is not against the statute that the profit may be made in the course of the carrying out the purposes allowed by the act.

[*Lord Campbell*, C. J. Would not that be a bonus?]

Not unless it is divided among the members. Here all is to be expended for the purposes of literature, science, and the fine arts.

[*Lord Campbell*, C. J. The society might expend the money in buying pictures.

Wightman, J. And by the rules, the artists may be members.]

If so, that might be substantially a bonus to them, and not for the purposes of literature, science, or the fine arts. But there is an express rule of the society against any bonus being made among the members. They referred also to *The Queen v. Pocock*, 8 Q. B. Rep. 729; s. c. 15 Law J. Rep. (N. S.) M. C. 132.

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Pashley and Wheeler, contra. The society must, as laid down in *Purvis v. Traill*, in its foundation and objects be solely for the purposes of science, literature, or the fine arts; and if they may use the building for any other purpose, they are not exempt. Consistently with the settlement deed, as stated in the case, there may be lectures and discussions in the institution on natural history, and on purely mechanical art, on matters connected with what is termed the "useful arts;" and it never was intended by the legislature that the exemption should apply to such matters. Any branch of education too, religious or secular, would be "consistent with the general purposes of the institution."

[*Lord Campbell*, C. J. Elementary education seems to have been the purpose contemplated.]

The case of *The Queen v. Pocock* strongly applies, and shows that no exemption can be claimed in that respect. There is nothing to limit the arts for the promotion of which the society is established to "the fine arts." Every thing falling under the head "liberal arts" would be included. Then, secondly, the society have a beneficial occupation of the institution which disentitles them to the exemption. The deed of settlement authorizes the leasing of part of the premises, so that the society might themselves occupy three days of the week, and let for their benefit other three days.

[*Lord Campbell*, C. J. That would not be a leasing of part, within the ordinary meaning of the power given by the deed.]

The case of *Purvis v. Traill* decides that the occupation should be in strict conformity with the purposes within the act, for which the society is constituted; and can it be said that the sale of pictures is one of such purposes?

[*Lord Campbell*, C. J. The money so made may be said to be for the promotion of the fine arts.]

It may, but that should have been shown.

[*Lord Campbell*, C. J. The primary object seems to be the promoting of the fine arts.]

The occupation may be beneficial, although the money goes into the general funds of the society. *The Queen v. The Baptist Missionary Society*, 10 Q. B. Rep. 884; s. c. 18 Law J. Rep. (N. S.) M. C. 194.

[*Lord Campbell*, C. J. That is a totally different case from the present, and under another act of Parliament.]

The principle of exemption is a benefit to the public, equivalent to the amount of the rate, but here the society may be carried on for the ultimate private advantage of the members. The deed, in effect, provides for what may be called a deferred bonus or dividend, which is to go on accumulating during the existence of the society, and to be paid after dissolution according to a mode of division ascertained at the time of dissolution. Further, a power to alter the rules of the society is retained, (*Ex parte the Overseers of Birmingham*.) and that is inconsistent with the act.

[*Coleridge*, J. What the act provides is, that the society "may not" by its laws make any dividend, &c. That regulation may be repealed.]

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The reserving of the power is contrary to the act.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

LORD CAMPBELL, C. J. We are of opinion that this case cannot be distinguished from *The Birmingham Library Case*, the authority of which was not disputed on the part of the respondents. The Royal Manchester Institution appears to us to be established exclusively for purposes of science, literature, and the fine arts; it is supported wholly or in part by annual voluntary contributions, and by its laws it may not while it subsists make any dividend, gift, or division, or bonus in money, unto or between any of its members. The members seem to have in view sincerely and disinterestedly what they profess, and not to have for their chief object their own recreation and amusement. The building was erected from funds subscribed by shareholders, and it is vested in trustees, upon trust to permit it to be used for the purposes of literature, science, and the fine arts. Lectures are given there upon literary and scientific subjects, to which officers in the army, literary and scientific artists, and other strangers are admitted gratuitously on application to the council. Any of the lectures which are not given gratuitously are paid for by the society. At the *conversazioni, soirées*, and other meetings, literary and scientific papers are read, the person who reads a paper having the power to invite twenty friends, and the leading literary and scientific persons in the neighborhood having free admission. Rooms in the institution are devoted to the exhibition of paintings, and artists are assisted in the sale of their works without any view to profit on the part of the society. There is likewise a museum for antiquities and specimens of natural history. The expense is chiefly defrayed by the subscription of the members. This being *prima facie* a society within the scope of the act of Parliament, we have to examine the objections made to the exemption claimed. The first is founded on a power vested in the trustees to let off any part of the building not required for the uses of the society. A part is let off to tenants, but for this part the exemption is not claimed, and the tenants are rated. The Greenwich case, (*Purvis v. Traill*), therefore, does not apply, for there the premises for which the exemption was claimed were let at a profit, for the exhibition of dwarfs and wild Indians. The case here finds that "the rents received from the tenants form part of and are applied as the general funds of the society."

Another objection is made upon the fact, that when paintings coming from a distance are sold at the exhibition, the society deducts 5*l.* per cent. on the price, which is represented as a commission, and evidence of carrying on a trade for profit. But the case finds that the society pays the carriage of these paintings, and that this percentage is applied, but does not suffice to defray the expense of the carriage. No deduction is made from the price of paintings exhibited by resident artists. The arrangement complained of, therefore, is evidently made with a view to the encouragement of the fine arts.

¹ LORD CAMPBELL, C. J., COLERIDGE and WIGHTMAN, JJ.

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The next objection arises from an expression in the trust deed, that the building is to be used for the exhibition of works of art, &c., for the delivery of lectures on subjects of science, literature, or the arts, "and otherwise for the imparting and diffusing of education and knowledge." It is argued that this would authorize any system of religious or secular education, which, on the authority of *The Queen v. Pocock*, cannot be considered as coming within the scope of 6 & 7 Vict. c. 36. The education and knowledge here mentioned might have been fairly inferred to be such as is to be communicated by lectures, the exhibition of paintings, and other methods of the same nature; but to remove all doubt upon the subject, the words are added, "consistent with the general purposes of the said institution." We do not think that a school for elementary education, or for Bible reading, or for training teachers, would be consistent with these purposes.

It is then said that this is a society for profit, because strangers are admitted to the exhibition of paintings, &c., on paying a small fee at the door; but the money thus received is applied to the purposes of the society, and may be considered as the voluntary contribution of the visitors, who for the time are admitted to the privilege of members.

Lastly comes the objection, that by the deed of settlement it is expressly declared that upon a dissolution of the society, the property belonging to it is to be sold, and the proceeds, after payment of debts, are to be divided among the members. This is not against any positive prohibition in the statute, but the respondents' counsel suggest that it might enable the members to accumulate a large capital, and to divide it among themselves, increased by the saving of the poor rates. The deed of settlement, however, only expresses a power which would impliedly belong to the trustees and the members, and which was relied upon in the *Birmingham Case*. Lord Denman, delivering the judgment of the court, there says, "No law of the society can prevent its dissolution and a consequent division of the common stock. This sort of division the legislature did not intend to prevent." If any such scheme of accumulation as is suggested could be proved to have been laid, then the society would not be "established exclusively for purposes of science, literature, or the fine arts;" but here there is no reason to suppose that any view of profit is entertained, and, therefore, the ultimate right to a dividend, after the society is dissolved, is no answer to the claim of exemption while the society exists and honestly pursues the laudable objects for which it was instituted.

Upon the whole case, we are of opinion that the recorder decided properly in amending the rate, by striking out the assessment upon this society, and that the rule for quashing the order of sessions ought to be discharged.

*Order of sessions confirmed.*¹

¹ See the next case.

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REGINA v. BRANDT & others.¹

Hilary Term, January 28, 1851.

Rate — Liability to Poor Rates — Manchester Concert Hall Society — Purposes of the Fine Arts — 6 & 7 Vict. c. 36 — Concerts and Musical Entertainments — Primary Object of Society — Musical Club for Amusement of Members.

The Manchester Concert Hall was built by a society, partly from funds subscribed by eighty individuals who were among its first subscribers, and was held in trust to pay off that amount, and subject thereto in trust for the society. The number of subscribers of five guineas each annually to the society was six hundred, and besides these there was another class called *quasi* members, who paid an annual subscription of two guineas and a half each, and all were admitted by ballot. The annual subscriptions, amounting to about 3,000*l.*, went to pay off the above debt and interest, and to meet the current expenses of furnishing the Concert Hall, and supporting the society generally. The Concert Hall was used by the society for concerts and musical entertainments, open to subscribers, and parties admitted by tickets to subscribers, at which music of a high class was generally practised and performed, and for the general business of the society, except on one occasion, in 1848, when the use of the hall was given gratuitously by the society for the charitable purpose of a public concert, on behalf of the funds of the Manchester Royal Infirmary. Each subscriber was entitled to tickets of admission to every public and private concert, which were transferable to ladies generally, and to gentlemen and *quasi* subscribers, subject to certain restrictions. Each subscriber might also give orders for the admission of four persons to the private or undress concerts. The *quasi* subscribers were each entitled to admission, without ticket, to the private or undress concerts. Most of the vocal and instrumental performers were paid out of the amount subscribed, which was also expended in the purchase of music for the society's use. A highly skilled professor of music was induced to settle and remain in Manchester, solely because of the existence of the society, the tendency of which had been to promote and improve the science and practice of music in Manchester and the neighborhood. No dividend or bonus in money had ever been made to any of the members, and the rules of the society provided that in the event of a dissolution, the funds, after payment of all debts, should be applied to the promotion and encouragement of music:—

Held, that the society could be regarded only as a musical club, the primary object of which was the gratification and amusement of the members and their families, and therefore not entitled to an exemption from poor rates, as a society instituted for the purposes of the fine arts exclusively, within the 6 & 7 Vict. c. 36:—

Held, also, that had the society been otherwise entitled to the exemption, the accidental use of the hall for the benefit of the Infirmary, in 1848, would not have affected the right of exemption.

THIS was an appeal against a rate made and assessed for the relief of the poor, and for other purposes relating to the poor of the township of Manchester, in which the appellants were rated as occupiers of a building called the Concert Hall. Upon the hearing of the appeal before the recorder of the borough of Manchester, it was ordered that the rate should stand confirmed, subject to the opinion of the Court of Queen's Bench, on the following case:—

After setting out that part of the rate which affected the appellants, the case stated that the building in the rate mentioned was called the Manchester Concert Hall, and was built by a society called the Manchester Concert Hall Society, partly from funds subscribed by about eighty individuals, who were among the first subscribers to the society or institution, who held in trust to secure to the above parties

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the money so advanced and interest, and subject to that in trust for the said society. The money so advanced was originally 8000*l*. The society was composed of six hundred subscribers, comprising a peer of the realm, clergymen, baronets, members of Parliament, magistrates, barristers at law, doctors of medicine, and other professional men, bankers and merchants, who were admitted by ballot, and respectively paid an annual subscription of five guineas; and of *quasi* subscribers, who were also admitted by ballot, and respectively paid an annual subscription of 2*l*. 12*s*. 6*d*. The society was wholly supported by those annual subscriptions. The rules of the society¹ and the deed declaring the trusts of the Concert Hall were to form a part of the case.

¹ The following are the more material rules:—

Rule 1. The purpose of this institution is and shall be exclusively the promotion of the science or art of music within the town of Manchester, by the giving of concerts or other musical performances at the Concert Hall now belonging to the institution, or at such other place within the township of Manchester as may be provided for the purpose, pursuant to the rules of the institution; the performances to be open to the subscribers to or members of the institution, and to ladies or strangers introduced by them or otherwise, as the committee of management from time to time shall direct, within the restrictions of the rules of the institution, and the institution to be supported wholly by the annual voluntary contributions of its subscribers or members.

Rule 2. The number of subscribers to be limited to 600, and each of them shall be entitled to two tickets, one for his own admission and the other transferable to ladies or strangers, and in the event of a subscriber not using a ticket, the same to be transferable in like manner.

Rule 5. The management of the institution to be vested in the committee of twelve subscribers, who shall have the control of the funds, the arrangement of the rooms, and all other affairs of the institution not immediately connected with the orchestra; and as to the management of the orchestra, the engagement of performers, the selection of music, and all other matters connected with the musical department, (except the number of the concerts to be given in any year,) the same shall be under the exclusive control of the musical directors.

Rule 13. Any person wishing to become a subscriber must be proposed in writing by two subscribers not members of the committee; and no person shall be voted or balloted for, unless his or her name shall have been entered in the book of candidates one month at least before the day of election, and no candidate shall be admitted unless there be two thirds of the votes or balls in his or her favor.

Rule 14. Candidates whose names shall have been on the list for admission as subscribers for one month, may be voted or balloted for as *quasi* subscribers, and if approved, may, on the payment of an annual sum of two guineas and a half, payable in advance on, &c., be deemed admissible by a subscriber's ticket to the public concerts, and without further order to the private concerts, until such time as they shall in rotation be eligible as ordinary subscribers, but they shall not be entitled to any other privilege as members of the institution.

Rule 23. The institution may be dissolved, provided a resolution to that effect shall be agreed upon by a special general meeting of the subscribers, at which one third in number of the subscribers for the time being shall be present, and at which two thirds in number, at least, of the subscribers actually present shall agree to the resolution.

Rule 24. All the funds and moneys of the institution shall, during the subsistence thereof, be applied by, or by the direction of, the committee, in paying the debts and demands for the time being owing by the institution, and carrying out the purposes thereof, as defined in Rule 1, in such manner as the committee may think proper; and in the event of the dissolution of the institution, then, after payment of all debts and demands then owing by the institution, the remaining funds and moneys thereof, if any, shall be paid or applied by, or by the direction of, the committee, to such persons and in such manner as the committee for the time being may think fit for the promotion

The existing mortgage debt was 6000*l.* only, the original debt having been reduced by payments made out of the subscriptions. Interest on such debt, at the rate of 5*l.* per cent., was also paid out of the annual subscriptions to the parties who advanced the moneys, or their representatives; but such parties had no benefit or superiority over the subscribers, and simply received the interest on their moneys. The society had in their building an organ, which cost about 500*l.*, also two ornamental looking-glasses let into the panneling of the room, which cost about 200*l.*; also chairs, cushions, and other furniture, all paid for out of the funds of the society. The annual subscriptions amounted to upwards of 3000*l.*, and the chief rent and cost of repairs of the building and additional furniture were paid out of the same fund. The debt had been reduced from time to time, and would be so until paid off, by payments out of the funds of the society, of sums of money among the lenders, all of whom were subscribers to or members of the society, but some had ceased to be so. The number of members or subscribers being limited, persons desirous of being subscribers, and who were on the list of candidates, had to wait until vacancies occurred, and persons' names had been down for several years before they were elected members. Any member or subscriber might, of his own free will and pleasure, cease to be a subscriber or member.

The building was used by the society for the giving of concerts and musical entertainments to the subscribers, and parties were admitted by tickets issued to subscribers. It was also used for general meetings of subscribers, at which the financial business was transacted, and for the meeting of the members of the different committees of the society. Each subscriber was entitled to receive two tickets for admission to each public or dress concert, which tickets were transferable to ladies generally, and to gentlemen who did not reside within six miles of Manchester, and to the *quasi* subscribers, who had no ticket issued to them. Of the public or dress concerts there were about seven annually. Each subscriber and *quasi* subscriber was also entitled to admission for himself, without ticket, to each private or undress concert, and each subscriber might give orders for the admission of four persons to each undress concert, of which there were about six in the year. Most of the vocal and instrumental performers were paid out of the funds raised by the said subscription; and the expenditure annually on that account was upwards of 2000*l.* Printed and written music was also purchased for the use of the society out of the funds. The music performed and practised at Concert Hall was, generally speaking, of a high class, and there was no other society in Manchester where music of a high class was performed. It had tended to the promotion of music in the town and neighborhood of Manchester, and had decidedly improved the science and practice of music. The soci-

and encouragement of music within the town of Manchester; but no dividend, gift, division, or bonus in money shall at any time or under any circumstances be made unto or between the subscribers to or members of the institution, or any of them.

The 26th rule provided specially for the alteration of, or addition to, the rules from time to time.

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ety spent considerable sums of money among professors of music and musicians. A professor of music, highly skilled therein, had been induced by the society to come from the metropolis and settle in Manchester, and he would not remain were the society discontinued. The society had no other place of meeting than the said building. One concert was held in the building in December, 1848, for the benefit of the Manchester Royal Infirmary, to which the public generally were admitted by tickets issued by the officers of the infirmary, and the sum raised by the sale of such tickets amounted to upwards of 1000*l*. No portion of that sum had been received by or come into the hands or power of the subscribers to the Concert Hall, or their directors or treasurer, the use of the building having been allowed gratuitously by the directors for the benefit of the charity. It did not appear that any dividend, gift, division, or bonus in money had ever been made to or between any of the society unless as aforesaid.

The due making, signing, allowing, and publishing of the rate, and its regularity in other respects, were admitted. It was also admitted that the formal requisitions required by the 6 & 7 Vict. c. 36, s. 2, 3, for entitling a society to the benefit of the said act, had been duly complied with in respect of the building and the society, and the laws, rules, and regulations for the management thereof.

The recorder was of opinion that the society came within the exemption of the above act, but that they were liable to be rated, inasmuch as the building had been used for the concert in December, 1848, and accordingly confirmed the rate. If the Court of Queen's Bench was of opinion that the appellants ought to be rated in respect of the building, the rate was to be confirmed, but if of a contrary opinion, the rate was to be amended, by striking out that part in which the appellants were so rated.

Pashley and Wheeler, (January 18,) in support of the order of sessions. The rate in this case was properly made. The society was clearly not established exclusively for the purposes of science or literature. Nor can it be said to be exclusively for the purposes of the fine arts. The constitution of the society, and the rules by which it is managed, all show that the entertainment and amusement of its members, by means of good concerts, and a full audience, was the real object intended to be secured. If this society were entitled to exemption, the opera house, or any other theatre used for the purposes of musical entertainments, might equally claim an exemption. The act was intended to protect societies of this nature, only when they had for their primary object the promotion of the fine arts. Here, too, there was a profitable occupation of the building for purposes other than that allowed by the act. There is manifestly a sale of tickets by the members of the society as a body; and, although the proceeds go into the funds of the society, still it is for their profit. Consistently, also, with the rules, the members individually may derive a profit from the sale of the tickets allotted to each.

[*Lord Campbell*, C. J. By the 24th rule, the subscribers or mem-

bers can never derive any personal pecuniary advantage from the concern.]

But that rule may be altered just before a dissolution, the society in the mean time being allowed to go on profitably accumulating funds. The case of *Purvis v. Traill*, 3 Exch. Rep. 344; s. c. 18 Law J. Rep. (N. S.) M. C. 57, applies much more strongly here than in *The Royal Manchester Institution Case*, 20 Law J. Rep. (N. S.) 113, *ante*, p. 314.

Crompton and Cleasby, contra. The latter part of the recorder's decision is wrong. Music is clearly within the definition of the fine arts; and as here every concert promoted the taste for music, and in that respect tended to the public benefit, this society must be considered as coming within the scope and intent of the act. The amusement of the members was not its sole object, but the cultivation of music generally; and to that purpose the whole of the society's property is made applicable. It is said that the effect of the rules is to preclude the society from the benefit of the exemption in the act, but the general object of the society could hardly have been carried out in any other way. A sale of their tickets by the members of the society would be an abuse of the confidence placed in them, and contrary to the intention of the society's rules. It is even expressly provided by the 24th rule, that, in the event of a dissolution, the available funds, after payment of debts, shall be applied entirely for the promotion and encouragement of music within the town of Manchester. The society's substantial and *bona fide* object was the promotion of music; and that being so, the exemption in the act applies to the building in question.

Cur. adv. vult.

The judgment of the Court¹ was now delivered by

LORD CAMPBELL, C. J. In this case we are of opinion that the Manchester Concert Hall is liable to be rated to the relief of the poor. We do not think that the society by whom it is occupied can be considered as "established exclusively for the purposes of science, literature, or the fine arts." We do not doubt that music is one of the fine arts; but it appears to us that the principal object which the members have in view is their own amusement, and not the advancement of the art from which that amusement arises.

Let us see the history and nature of the Institution, as detailed in the case submitted to us. The Concert Hall was built at an expense of 8000*l.* by the Manchester Concert Society, the money being borrowed for that purpose. It was vested in trustees to secure the repayment of those advances with interest, and subject to that, in trust for the society. The society has six hundred members, consisting of parliament men, baronets, bankers, magistrates, barristers at law, and the wealthiest inhabitants of Manchester, with a peer of the realm at their head. The members are admitted by ballot, and pay an annual subscription of five guineas. There is another class called *quasi members*, likewise admitted by ballot, who pay an annual subscription

¹ LORD CAMPBELL, C. J., COLERIDGE, and WIGHTMAN, JJ.

of two guineas and a half. The subscriptions, after paying the current expenses of the institution, go to keep down the interest on the mortgage debt, and to pay off the principal, which is now reduced to 6000*l*. Among the expenses are the purchase of an organ for 500*l*., the purchase of ornamental mirrors which cost 200*l*., and the purchase of other furniture, seemingly of a very luxurious description. The annual subscriptions exceed 3000*l*. The society is in high repute, and eagerly sought after, so that, the members being limited, candidates are obliged to wait for years before they can be balloted for. The building is used for the giving of concerts to the subscribers, and parties admitted by tickets issued to the subscribers. The concerts are divided into "dress concerts" and "undress concerts," which are respectively subject to various regulations, particularly defining the class of ladies to whom the tickets shall be transferable, and the privileges of the *quasi* subscribers. Most of the vocal and instrumental performers are paid out of the funds of the society, while some of the members appear to perform gratuitously.

We are to determine whether this be a society which the legislature intended to exempt from the payment of poor rates, not injuring by the exemption those paupers who receive parochial relief, but laying an additional burden upon the class immediately above them. If such be the declared intention of the legislature, we are bound to give it effect. But, though the object of this society be very innocent and very laudable, and the art of music is encouraged by their devotion to it, we can only regard them as a club of six hundred gentlemen, who are associated for the amusement of themselves and their families. In considering whether any society is entitled to the exemption under the act, we must see whether the promotion of science, literature, or the fine arts be the primary object of the members. If it be, they would be entitled to the exemption, although they may incidentally enjoy the pleasure which arises from intellectual and refined pursuits. But where their own amusement is their primary object, we think it was not intended to give them any such premium as a virtual rate upon the inhabitants of the parish in which their place of meeting happens to stand. It is certainly found by the sessions that a taste for music has been promoted in Manchester by this society; nay, "that a professor of music, highly skilled therein, has been induced by this society to come from the metropolis and settle in Manchester, who would not remain there if the society were discontinued." We trust that the society may long flourish, paying its poor rates. At any rate, we cannot distinguish this from any other public amusement conducted in a great town by subscription. If a theatre were established on the same footing, it would have an equal claim to exemption, and the same argument might be urged in favor of a subscription ball-room. In the Greek mythology there was a muse of dancing as well as of music.

We look upon this institution as totally different from the "Birmingham Library" or the "Manchester Institution," where the members, not with a view to their own gratification, but to the good of others, by cultivating in them a taste for literature, science, and the

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fine arts, subscribe money and contribute their personal trouble; and may therefore be fairly supposed to be objects of the special favor of the legislature at the cost of their fellow-parishioners.

Had this musical club been otherwise entitled to the exemption claimed, we should not have thought that it was disentitled by the accidental use of its rooms on one occasion in the year 1848, for a purpose of pure charity; but we think that, on broader grounds, the recorder ought to have held that the rate was properly imposed; so that, although we differ from him in his *ratio decidendi*, we confirm his decision, and the rule for quashing the order of sessions will still be discharged.

*Order of sessions confirmed.*¹

REGINA v. THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.²

REGINA v. THE SOUTH-EASTERN RAILWAY COMPANY.²

REGINA v. THE MIDLAND RAILWAY COMPANY.²

Hilary Vacation, February 22, 1851.

Poor Rate — Railway Company — Principle of Assessment — Parochial Earnings — Mode of ascertaining ratable Value — Deductions — Depreciation of Permanent Way — Agreement for exchanging Toll — Date at which ratable Value is to be calculated.

The legal principle of rating sanctioned by the courts and recognized by the Parochial Assessments Act, 6 & 7 Will. 4, c. 96, is applicable to all cases where a company or an individual occupies in different parishes land forming one entire property; and the value which the land occupied in each parish produces, after the proper allowances have been made, is that upon which the occupier must be rated in each.

The occupation of a railway company does not in its broad principles differ from that of a canal company; and as the 6 & 7 Will. 4, c. 96, provides but one rule, and is intended to secure uniformity of rating, the same principle of assessment must be applied to both cases. Therefore, a rate is to be imposed upon a railway company upon the ordinary principle of ascertaining the actual ratable value of the land occupied by the company in each parish through which it passes, by the rules which are applicable to any other land occupied by other bodies or persons for other purposes.

The ratable value of the portion of railway occupied in any particular parish must be deduced from the net earnings in that parish, ascertained by a comparison of the profits and outgoings arising in that parish; and not by treating the ratable value, however constituted, of the whole line of railway as entire, and dividing it among the several parishes simply according to the distance which the line passes through each.

In ascertaining the ratable value of a portion of a railway in any parish, the amount at which the company is rated in another parish cannot be taken into consideration. But any expenses, wherever arising, which are shown to be necessary for keeping the hereditament in the parish at the value which is made the measure of the assessment, may properly be taken into consideration in arriving at that value.

There is no insuperable difficulty in applying the principle of parochial earnings to the

¹ See the preceding case.

² 20 Law J. Rep. (N. S.) M. C. 124. 15 Jur. 372.

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rating of railways, as companies are bound to afford to parish officers the means of laying the rate fairly.

A railway company is entitled to an annual deduction from the ascertained value of their occupation, in order to countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the supposed rent, according to the principle upon which such a deduction is allowed in all cases of property of a perishable nature.

Such a deduction is not included in the working expenses of the railway.

The company will not be disentitled to this deduction, because no annual charge for the purpose as meeting the depreciation has, in fact, been made on their receipts, either by way of outlay or setting apart any sum; although such a course ought to be adopted by the company.

Seemle, also, that whenever the time arrives for actually making the restoration, the company will be estopped from claiming more than the annual amount of deduction previously allowed to them.

Quere, whether the deduction could be allowed if the company had defrayed such expenses as had been incurred out of their capital instead of the revenues.

By an agreement between the B. Railway Company and the S. Railway Company, the traffic of the latter passed toll-free over a certain portion of the line of the former, in consideration of the traffic of the former passing toll-free over a certain equal portion of the line of the latter. A portion of the line of the B. Railway, affected by this arrangement, was within the respondent parish; but no part of the line of the S. Railway was within that parish:—

Held, that in estimating the ratable value of the B. Railway within the respondent parish, the value of the tolls which would have been received in respect of the passage of the traffic of the S. Railway Company was to be considered as rent in kind earned by the land, but that such earnings must be subject to exactly the same deductions as if they had been received in money, and therefore the B. Company were entitled to deduct the value of the tolls payable by them in respect of the passage of the traffic over an equal portion of the line of the S. Railway.

Where a rate made in November was based on the last published half-yearly accounts of the company made up to the 30th of June preceding, but in the interval between June and November the value of the working plant of the company had greatly increased, the company were held to be entitled to have their deductions calculated upon this increased value, and to have the rate amended accordingly, the sessions upon the appeal having been put into possession of the state of facts really existing when the rate was made.

Parish officers are to make a rate upon the supposed prospective value of the occupation ascertained from the latest evidence in their power as to antecedent value; and although they are justified in rating a railway company upon their latest published accounts, if that is the latest information reasonably procurable, yet if a new state of accounts is communicated to them by the company before they make the rate, they ought to take such new state of circumstances into account if they believe it to be true.

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ON appeal by the London, Brighton, and South Coast Railway Company against a rate made, on the 20th of November, 1847, for the relief of the poor of the parish of Croydon, in the county of Surrey, whereby the company were rated in respect of so much of the railway and land as lay within the parish, and of the stations within the same parish, in the sum of 21,360*l.*, the sessions amended the rate by reducing the assessment to the sum of 15,765*l.*, subject to the opinion of this court on the following case:—

The London, Brighton, and South Coast Railway Company was established under the name of the London and Brighton Railway Company, by an act of Parliament, 7 Will. 4, and 1 Vict. c. 119,

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which authorized them to make a railway to commence by a junction with a certain then intended railway called the London and Croydon Railway, at or near Sellhurst Farm, in the parish of Croydon, and to pass thence to Brighton; and also to make certain branch railways therein mentioned; that is to say, a branch railway to Shoreham, another branch railway to Newhaven, and another branch railway to Lewes.

Before the passing of that act, an act of Parliament had been obtained by the South-eastern Railway Company, 6 & 7 Will. 4, c. 75, whereby that company was established and empowered to make a railway from the London and Croydon Railway to Dover, the line of which last-mentioned railway, as sanctioned by Parliament, was to pass for a considerable distance in a direction nearly parallel and approaching to the line of the London and Brighton Railway, as authorized by the first-mentioned act of Parliament; and a provision was introduced in the first-mentioned act, (establishing the London and Brighton Railway Company,) that if the South-eastern Railway Company should within two years obtain powers to divert their railway, so that the same should form a junction with the London and Brighton Railway at any point upon, or to the northward of, a place called Earlswood Common, in the county of Surrey, the London and Brighton Railway Company was, upon such payment as therein mentioned, to transfer to the South-eastern Railway Company so much of the London and Brighton Railway, and the works, &c., as should be at, or to the northward of, the point at which the junction of the South-eastern Railway with the London and Brighton Railway should be authorized to be made. Before the expiration of the said period of two years, viz., on the 25th of April, 1839, an agreement was entered into between the London and Brighton Railway Company and the South-eastern Railway Company, by which it was (amongst other things) agreed, that if Parliament should authorize a diversion of the South-eastern Railway, so that it should form a junction with the London and Brighton Railway at any point upon or to the northward of Earlswood Common aforesaid, the South-eastern Railway Company (in lieu of being entitled to so much of the London and Brighton Railway as should be to the northward of the point of junction between the London and Brighton Railway and the South-eastern Railway) was to be entitled to an absolute transfer to themselves of the southern moiety (to be ascertained by exact measurement) of the portion of the London and Brighton Railway lying between the proposed points of junction thereof with the London and Croydon Railway, and with the South-eastern Railway respectively, and of all stations, works, &c.; and that from and after the transfer to the South-eastern Railway Company of the said southern moiety of the line of the London and Brighton Railway, between such points of junction as aforesaid, and if the authority of Parliament should be obtained enabling the said companies to enter into agreements respecting the use by them respectively of the said several lines within the said points of junction, all the traffic of the South-eastern Railway Company, passing in the carriages and trains

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of the same company, or of the lessee or lessees of the said company to whom they should let the whole of their said railway, should in consideration of the similar liberty and exemption next thereafter secured to the London and Brighton Railway Company, be allowed to pass to and from the junction of the London and Brighton Railway with the London and Croydon Railway, over the portion of the London and Brighton Railway which should connect such junction with the South-eastern Railway, without payment of any toll or compensation to the London and Brighton Railway Company in respect of such passage; and, in consideration thereof, all the traffic of the London and Brighton Railway Company passing in the carriages and trains of the same company, or the lessee or lessees of the said company to whom they should let the whole of their said railway, should be allowed to pass over the portion of the London and Brighton Railway which should be transferred to the South-eastern Railway Company, according to the foregoing provisions, without payment of any toll or compensation to the South-eastern Railway Company in respect of such passage; but such traffic of each of the said companies should be carried on without doing any wilful damage to the works belonging to the other of them, and subject to such general regulations as should have been made by such other company for regulating the traffic upon their railway, and to such regulations as should from time to time be made by the said companies jointly, relating to the premises; or that such arrangements should be made between the said companies under the authority of Parliament as should most nearly carry into effect the last foregoing agreements, without prejudice to the rights of the said companies, or either of them, to recover any tolls, or other compensation from any other company, or party or parties using the railroads or either of them, and that each company should keep the road which should be vested in themselves, according to the said agreement, and the works connected therewith, in sufficient repair and condition at their own costs; provided, that no lessee of either of the said companies should be entitled to the privilege aforesaid so long as such lessee should be in any way interested as a proprietor, lessee, or otherwise, in any other railway or portion of any other railway communicating with the South-eastern Railway or London and Brighton Railway, except as a shareholder only.

An act of Parliament, 2 & 3 Vict. c. 79, was, at the making of this agreement, before Parliament, and was shortly afterwards passed into a law, whereby the South-eastern Railway Company were empowered to divert their railway, so as to form a junction with the London and Brighton Railway at the point called Earlswood Common, and (after repeating the provisions contained in the former act, as to the transfer to the South-eastern Railway Company of so much of the London and Brighton Railway as lay to the north of the said point of junction) the South-eastern Railway Company were empowered to purchase, and the London and Brighton Railway Company were empowered to sell and transfer to the former, upon the terms and subject to the provisions and restrictions thereafter con-

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tained, one moiety, to be ascertained by exact longitudinal measurement, and which should be nearest to the point of junction thereby authorized to be made, of the South-eastern Railway with the London and Brighton Railway, or such other part as should be determined upon for that purpose by any agreement of both the said companies, under their common seals, of all that portion of the London and Brighton Railway which lay, or would lie, between the point of junction thereby authorized to be made thereof with the South-eastern Railway, and the point of junction with the London and Croydon Railway, and all stations, lands, works, &c., belonging to or held for the purposes of the portion of the railway which should be so purchased; provided that the South-eastern Railway Company declared their option to make such purchase by such notice as therein mentioned. And by another clause in the same act it was enacted, that from and after the transfer to the South-eastern Railway Company of the said moiety, or other part which should be transferred to them under the authority of that act, of the line of the London and Brighton Railway between such points of junction as aforesaid, it should be lawful for the said two companies, from time to time, to carry into effect any agreements between them, respecting the use by them respectively of the line lying between the said two points of junction, and the proportion and manner in which they should respectively be entitled to the tolls arising from the same line, or either moiety or separate part thereof, and to receive and recover such tolls, or to remit the same respectively as between themselves, according to any such agreement, without prejudice to the tolls or rates which they respectively were, or should, or would be authorized to receive from any other parties in the absence of any such agreement.

[Copies of these acts of Parliament,¹ and of the agreement of the 25th of April, 1839, accompanied the case, and were to be referred to as part thereof.]

The South-eastern Railway Company thereupon purchased and took from the London and Brighton Railway Company the southern

¹ The following sections of the London and Brighton Company's original act of incorporation, 7 Will. 4, & 1 Vict. c. 119, were referred to:—

Sect. 192. That the said company, or the directors of the said company, shall and they are hereby required to cause a true and particular account to be kept, and to be made up twice in every year, that is to say, on the 30th day of June and the 31st day of December, of the money received by or for the use of the said company by virtue of this act, and of the charges and expenses attending the making, maintaining, and carrying on the said undertaking, and of all other the receipts and expenditures of the said company up to those periods respectively, which account shall be laid before the half-yearly general meeting of the said company hereinbefore directed to be held in the months of August and February respectively, and which account shall also be produced to any proprietor who shall require to be allowed to examine or inspect the same at any convenient time within fourteen days prior to the day of such half-yearly general meeting.

Sect. 198. That it shall be lawful for the said company, and they are hereby empowered, from time to time, at any half-yearly general meeting, or at a special general meeting to be called for that purpose, to declare and make a dividend out of the clear profits of the said undertaking, and such dividend shall be after the rate of so much per share upon the several shares held by the members of the said company in the

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moiety of the portion of the London and Brighton Railway, lying between the said points of junction thereof with the London and Croydon Railway and with the South-eastern Railway respectively, and from that time, the right (provided by the agreement of the 25th of April, 1839) for the traffic of each company to pass without payment of toll over the moiety belonging to the other company of the said portion of railway lying between the said two points of junction, has been carried out in practice; the traffic of the London and Brighton Railway Company, until it became amalgamated with the London and Croydon Railway Company, and acquired the title of the London, Brighton, and South Coast Railway Company, and the traffic of the said amalgamated company, since that time, passing in the carriages and trains of the said companies respectively over, and using the southern moiety of that portion of the line, without paying any toll or compensation to the South-eastern Railway Company; and the traffic of the South-eastern Railway Company in like manner passing in the carriages and trains of that company over, and using the northern moiety of that portion of the line, without paying any toll or compensation to the London and Brighton Company, or to the London, Brighton, and South Coast Railway Company. Two miles and sixty-four chains of the northern moiety of the portion of the line of railway between the said two points of junction are situate within the parish of Croydon. No part of the southern moiety of the portion of the line of railway between the said two points of junction is situate within the parish of Croydon.

Independently of, and besides the reciprocal right of the two companies to have their traffic so pass over the portion of the railway lying between the said two points of junction without payment of any toll or other compensation, the London and Brighton Company, before the said amalgamation, and the London, Brighton, and South Coast Railway since that time, have paid, and the latter company still pay, a money toll to the South-eastern Railway Company for the privilege of using a certain other portion of the South-eastern Railway, not to the parish of Croydon; and, on the other hand, the

joint stock thereof: Provided always that such dividends shall not be made oftener than quarterly, and no dividends shall be made exceeding the net amount of clear profit at the time being in the hands of the said company, nor whereby the capital of the said company shall in any degree be reduced or repaired, (*sic*.)

Sect. 257. That in all cases in which the said company shall carry for their own profit upon the said railway any passengers, &c., a separate account shall be duly kept, showing the amount of rates or tolls received by the said company, and of the tolls which would have been received by them for the use of the said railway in respect of such passengers, &c., if carried by any other party or parties; and the overseers of the poor of the several parishes and townships through which the said railway shall pass shall have free access to and liberty to inspect the same at any time during the first fourteen days in the months of February and August in each year; and in case the said company shall refuse to keep such separate accounts as aforesaid, the said company shall be liable to pay the sum of 300*l.*, and in case the said company shall refuse to permit any overseer of the parish through which the said main line of railway or branch railways shall respectively pass to inspect the said accounts as aforesaid so far as relates to their own respective parishes, the said company shall forfeit and pay the sum of 5*l.* for each and every day the said company shall refuse such inspection, &c.

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South-eastern Railway Company, before the said amalgamation, paid to the London and Brighton Railway Company, and since that time have paid and still pay to the London, Brighton, and South Coast Railway Company, a money toll for using another portion, consisting of seven miles forty-two chains of their railway, not comprised within the terms of the act of Parliament, 2 & 3 Vict. c. 79, or the agreement of the 25th of April, 1839, and of which portion one mile and eighteen chains are within the parish of Croydon.

The London and Brighton Railway Company afterwards obtained acts of Parliament authorizing them to construct certain other branch railways communicating with their main line, that is to say, a branch railway from Chichester to Havant; and from Croydon to Epsom; from Havant to Portsmouth; from Kymer to Lewes, (called Kymer Branch.) By virtue of an act of Parliament, 9 & 10 Vict. c. 283, the London and Brighton Railway Company and the London and Croydon Railway Company became, on and from the 1st of July, 1846, amalgamated into and formed one company by and under the name of "The London, Brighton, and South Coast Railway Company."

At the beginning of the year 1847, the London, Brighton, and South Coast Railway Company had one hundred and seven miles of railway completed and in full operation, namely, the original line from London to Croydon, being a length of ten miles and forty chains, or thereabouts; the London and Brighton main line of railway, from its junction with the London and Croydon Railway, at or near Sellhurst Farm to Brighton, a length (without including the six miles so as aforesaid transferred to the South-eastern Railway Company) of thirty-five miles; the branch from Brighton through Shoreham to Chichester twenty-eight and a half miles; and the branch from Brighton to Hastings being thirty-three miles, or thereabouts. Between the end of January and the end of June, 1847, the company had completed and opened for traffic twenty-five additional miles of railway, that is to say, the branch from Chichester to Havant (nine miles) opened in March, 1847; the branch from Croydon to Epsom (eight miles) opened in May, 1847; and the branch from Havant to Portsmouth (seven miles) opened in June, 1847. Between that period and the end of 1847, fifteen miles more were opened, viz., the branch from Kymer to Lewes, (nine one fourth miles,) and the branch to Newhaven, (five three fourth miles.) The number of days during which these several branches were completed and in operation before the 30th of June, the 20th of November, and the 31st of December respectively, being calculated, it was agreed that the company must be considered to have had lines of railways equal to one hundred and eleven miles of railway completed and in operation for the whole year ending on the 30th of June, 1847, and lines of railway equal to one hundred and twenty-six miles of railway completed and in operation for the whole year ending on the 20th of November, or the 31st of December, 1847. In the figures here given, the six miles transferred to the London and South-eastern Railway Company (being the southern moiety of the portion of railway between the

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points of junction aforesaid) are not included. Of the length of railway thus opened by the company in and prior to June, 1847, six miles and thirty-eight chains are within the parish of Croydon.

On the main line and branches there were on the 30th of June, 1847, and at the time of the making of the rate, forty-eight stations, exclusive of the great terminal station at London Bridge, and of these, three stations are within the parish of Croydon.

The London, Brighton, and South Coast Railway Company, since their railways came into operation, have been accustomed to provide locomotive power and carriages, and have themselves conveyed upon their railway and its branches, as, and when they were completed, passengers, cattle, and goods for hire; and, in point of fact, since the completion of the railway, the company has been in exclusive occupation thereof, no other carriers having availed themselves of the right conferred by the acts, of providing carriages or locomotive power independently of the company, except that under the agreement of the 25th of April, 1839, and the act of 2 & 3 Vict. c 79, the South-eastern Railway Company has found and provided its own carriages, and trains, and locomotives, for conveying the traffic over the northern moiety of the portion of railway lying between the two points of junction before mentioned.

At the ordinary half-yearly meeting of the London, Brighton, and South Coast Railway Company, held on the 10th of August, 1847, the directors of the company submitted to the proprietors a statement of the stock and share account of the company, and also a half-yearly statement (made up to the 30th of June, 1847) of the capital account, and of the revenue account of the company; and at the next ordinary half-yearly meeting, held on the 5th of February, 1848, the directors in like manner submitted to the proprietors a statement of the stock and share account, and also a half-yearly statement, made up to the 31st of December, 1847, of the capital account, and of the revenue account of the company. [Copies of these statements were annexed to this case and were to be referred to as part thereof.]

The gross revenue earned on the railway during the year ending the 30th of June, 1847, amounted to 418,600*l.* The gross revenue earned during the year ending the 31st of December, 1847, amounted to 441,780*l.*, and if the earnings were calculated for the year ending the 20th of November, 1847, the result would be substantially the same as for the year ending the 31st of December, 1847. These items include the whole of the money toll paid by the South-eastern Railway Company, and also the sum which the sessions found would have been a fair annual rent for the South-eastern Railway Company to pay to the appellants, for the privilege of having their traffic pass over and using the northern moiety of the portion of line between the two points of junction aforesaid, if that privilege had been conceded to the South-eastern Railway Company for a pecuniary consideration. The gross revenue earned by so much of the railway as is within the parish of Croydon, during the year ending the 30th of June, 1847, amounted to the sum of 39,000*l.*, and during the year ending the 31st of December, 1847, to the sum of 40,027*l.*, and if the earnings were

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calculated during the year ending the 20th of November, 1847, the result would be substantially the same. These sums include so much of the money toll paid by the South-eastern Railway Company to the appellants as was paid by the former in respect of that part of the London, and Brighton, and South Coast Railway situate within the parish of Croydon, and they include the sum which the sessions found would have been a fair annual rent for the South-eastern Railway company to pay to the appellants, for the privilege of having their traffic pass over and using so much of the said northern moiety of the portion of line aforesaid, as is within the parish of Croydon, if such privilege had been conceded to them for a pecuniary consideration. The sessions found that the three stations situate in the parish of Croydon were of the ratable value of 1500*l*.

The respondents claimed a right to rate the company on the principle of parochial earnings; that is to say, at such sum as a solvent tenant would pay as annual rent for the stations and portion of railway within the parish, regard being had to the net revenue earned within the parish. The appellants contended that the rate ought to be based on the mileage principle; that is, that they ought to be rated in respect of that portion of their railway situate within the parish, in such proportion to the net earnings of the whole line of railway as the length of that portion of the railway within the parish bears to the total length of the whole line of railway, to which should be added the ratable value of the three stations within the parish.

The value of the working plant of the company, during the year which ended on the 30th of June, 1847, amounted to 260,000*l*. Between that date and the 20th of November, 1847, in consequence of the ascertained insufficiency of the plant to work the line efficiently, and further, in anticipation of what would be necessary to work the additional mileage consequent on the opening of the new branches, it was considerably increased, and on the 20th of November, 1847, it was worth 350,000*l*., and (some additional plant being purchased still later in 1847, which counterbalanced the depreciation of the existing plant) it may be taken to have continued of the value of 350,000*l*. until and on the 31st of December, 1847. The sessions found this to be a proper and not excessive quantity of plant for the efficient working of the railway during the year.

The sessions found that if the mileage principle (contended for by the appellants) were the proper principle on which to base the rate, the following deductions were proper to be made from the gross revenue earned by the railway during the year ending the 31st of December, 1847:—

- | | | |
|---|-------------------------|--------|
| 1. Working expenses for the year, (including, amongst other things, locomotive power, maintenance of the way in working condition, watching the same, rates and taxes, and government duty, &c.,) | } £215,135 ¹ | |
| 2. Rental of stations not in the parish, | | |
| | | 20,000 |

¹ This sum included the money toll paid to the South-eastern Railway Company and the supposed rent which the sessions found that the appellants would have had

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3. Interest on capital invested in working plant,	17,500
4. Depreciation of that plant during the year,	35,000
5. Tenant's profits, (he paying insurance, income tax, &c.,)	43,750
	<hr/>
Total,	£331,385

The gross earnings of the year ending the 31st of December, 1847, viz., 441,780*l.*, being thus distributed over the number of miles (one hundred twenty-six) which earned them, the result would be 3506*l.*, as the gross earnings per mile; and the amount of deductions, being distributed in like manner, would give 2630*l.*, as the deduction per mile, and the net earnings per mile would be 876*l.*; and, supposing the mileage principle to be the proper one, the sessions found the ratable value of the six miles and thirty-eight chains of railway within the parish of Croydon to be 5672*l.*, and 1500*l.* to be the ratable value of the three stations within the same parish; and the sessions found that the rate on the appellants, in respect of the railway and stations, if the mileage principle were the correct one, ought to be on the amount of those two sums added together, viz., on 7172*l.*

The sessions were, however, of opinion, that the parochial earnings' principle, contended for by the respondents, was the proper principle on which to base the rate. The working expenses incurred in earning part of the revenue within the parish of Croydon, viz., that arising from the money toll paid by the South-eastern Railway Company, in respect of the one mile eighteen chains, and the supposed rent which that company would have given for the right which they acquired under the act of Parliament and the agreement of the 25th of April, 1839, of using the two miles and sixty-four chains, without payment of toll or compensation, are much less in proportion than the average working expenses incurred in earning the revenue upon the line generally. The working expenses incurred in earning the residue of the revenue within the parish are somewhat greater than the average on the line generally, and giving the appellants credit for the excess in the latter instance, as far as it went, against the saving in the former, the sessions found the ratable value of the six miles and thirty-eight chains of railway within the parish of Croydon, on the parochial earnings' principle, to be 14,265*l.*, and the ratable value of the three stations therein being 1500*l.*, and they accordingly, subject to the opinion of this court, reduced the rate to the amount of those two sums added together, viz., 15,765*l.*

The respondents, however, claimed to be entitled to base the rate on the earnings made during the year ending the 30th of June, 1847, and that the deductions ought to have been made in regard to the state of things existing during that period, and not to the state of

to pay the South-eastern Railway Company for the privilege of using the six miles, being the southern moiety of the portion of railway between the two points of junction, if they had not conceded a similar right to the South-eastern Railway Company in respect of the six miles, being the northern moiety; it also included such expenses as the sessions found to be incurred by the appellants in respect of the said toll and supposed rent from the South-eastern Railway Company.

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things existing during the year ending the 20th of November, or the 31st of December, 1847.

The sessions were of opinion that the rate ought to be based on the state of things existing at the time the rate was made, and have assessed the rate on that principle. But if the court should be of opinion that the sessions ought to have allowed the last-mentioned claim of the respondents, the sessions found that the rate in respect of the portion of the railway and stations within the parish of Croydon ought to have been 9923*l.* instead of 7172*l.*, if calculated on the mileage principle, and ought to have been 18,599*l.* instead of 15,765*l.*, if calculated on the parochial earnings' principle.

Besides the allowance already made, under the head of "working expenses," for the annual cost of keeping the way in a working condition, the appellants further claimed a right to deduct from the amount of the gross earnings of the year such additional sum, besides the annual costs aforesaid, as would countervail the depreciation which takes place in the permanent way, (rails, sleepers, &c.,) so as to maintain the permanent way in a state to command a rent equal to that which the sessions have assumed to be a fair rent in fixing the assessment. The respondents denied the right of the appellants to this deduction. The sessions found that the rates in the parish of Croydon, including the rate which is the subject of the present appeal, are made in pursuance of the Parochial Assessment Act, 6 & 7 Will. 4, c. 96; that there are in each rate two columns, one headed "gross estimated rental," the other "ratable value;" and that the sum set in the latter column opposite to the property rated, being the sum on which the assessment is made, varies from that set opposite the same property in the former column, the sum inserted as the "ratable value" being that which the parish officers judge to be the sum which would be received by the landlord after all the deductions contemplated by the Parochial Assessment Act; and the sum inserted as such "ratable value" in this parish being, on the average, about one quarter less than the gross estimated rental in the case of buildings, about one seventh less in the case of land occupied with farm buildings, and one tenth less in the case of land occupied alone.

The sessions found that the sum of 100*l.* per mile would be a fit sum to deduct for the purpose of countervailing the depreciation which takes place in the permanent way, so as to maintain it in a state to command the rent aforesaid, supposing the court should be of opinion that, under the circumstances, any deduction ought to have been made in respect thereof. But, it being proved that the appellants had never hitherto, in fact, set apart any annual or other sum out of the earnings of the railway, for the purpose of meeting this depreciation of the permanent way, the sessions disallowed the claim of the appellants to this deduction. If the court should be of opinion that the appellants were entitled to this deduction, the sessions found that the rate, whether the mileage or the parochial earnings' principle be adopted by the court, should be further reduced by the sum of 647*l.* 10*s.*

The appellant further contended, that assuming the parochial earn-

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ings' principle to be the proper one, the rate should have been based on the net actual earnings of the railway within the parish, without including therein any thing in respect of the supposed rent or sum which the South-eastern Railway Company might reasonably be expected to pay for the right of having their traffic pass over so much (two miles and sixty-four chains) as lies within the parish of the northern moiety of the portion of railway between the two points of junction before mentioned, without payment of any toll or other compensation, if that right had been conceded to them for a pecuniary consideration; or, supposing such supposed rent to be rightly included in the earnings within the parish, that a corresponding amount ought to be allowed to the appellants as working expenses, inasmuch as, to earn such supposed rent, the appellants must be supposed to have paid an equal sum to the South-eastern Railway Company, for the privilege of having their (the appellants') traffic pass over two miles and sixty-four chains of the southern moiety of the said portion of railway between the said two points of junction. The sessions were of a contrary opinion, and, as before mentioned, they have, in the sum to which they have so as aforesaid reduced the rate, included the amount of the rent or annual sum which, in their opinion, the South-eastern Railway Company might have been expected to pay for the last-mentioned right in respect of the two miles and sixty-four chains which are within the parish of the northern moiety of the said portion of railway, if such right had been conceded to them for a pecuniary consideration; except that, in estimating the working expenses to be deducted from the gross earnings within the parish, they have allowed to the appellants, besides the general costs of maintaining the way in a working condition, watching the same, &c., such further sum as they found to be reasonably incurred by the appellants in and about the collecting the said supposed rent.

If the court should be of opinion that the decision of the sessions was erroneous in this respect, and that the whole of the supposed rent or annual sum in respect of the two miles and sixty-four chains within the parish ought to have been excluded from the gross earnings, or that an equal sum ought to have been deducted as working expenses, then the sessions found that the rate ought to be further reduced by deducting from it the sum of 5009*l.*, supposing the court adopted the parochial earnings' principle for either year, and by deducting from the rate the sum of 554*l.*, if the mileage principle be adopted for the year ending 31st of December, 1847, or the sum of 629*l.*, if the mileage principle be adopted for the year ending the 30th of June, 1847.

The court to have the power of amending, quashing, or otherwise dealing with the rate as they may deem right.

Pashley and *J. Clerk*, in support of the order of sessions.¹ The first question here raised, viz., whether the mileage or earnings prin-

¹ November 21 and 27, 1849, before COLERIDGE, WIGHTMAN, and ERLE, JJ. PATTERSON, J., heard part only of the argument.

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ciple is the correct one, has never been properly discussed and decided. It was abandoned in *The Queen v. The London and South-western Railway Company*, 1 Q. B. Rep. 558; s. c. 11 Law J. Rep. (N. S.) M. C. 93, and was taken for granted in the two subsequent cases arising on railway rating. The mileage principle does not give the most correct ratable value, if the proportional part of the earnings and outgoings due to the particular parish can be ascertained, as is shown to be the case here. In *The Queen v. The Grand Junction Railway Company*, 4 Ibid. 18; s. c. 13 Law J. Rep. (N. S.) M. C. 94, and *The Queen v. The Great Western Railway Company*, 6 Ibid. 179; s. c. 18 Law J. Rep. (N. S.) M. C. 145, that course was not adopted; the gross earnings of the whole line only were ascertained. That there is no impossibility of finding the amount of earnings in the rating parish, either by means of through traffic or by tickets issued or received there, is proved by the findings in this case. If the mileage principle be adopted, it will at once sanction the application of a different mode of rating to railways from that which is applied to canals; as the latter have always been rated according to the earnings in the rating parish; and an apportionment according to the length of canal in the parish has been distinctly reprobated. *The King v. Kingswinford*, 7 B. & C. 236; s. c. *nom.* *The King v. The Dudley Canal Company*, 6 Law J. Rep. M. C. 3. *The King v. The Oxford Canal Company*, 10 Ibid. 163. *The King v. Woking*, 4 Ad. & E. 40; s. c. 6 Law J. Rep. (N. S.) M. C. 17. *The Queen v. Mile End Old Town*, 10 Q. B. Rep. 208; s. c. 16 Law J. Rep. (N. S.) M. C. 184. [They also referred to a case of *The Midland Railway Company*, appellants, v. *Armley*, respondents,¹ where the mode of calculation here contended for was adopted by the recorder of Leeds.]

Secondly, the claim to an allowance in respect of the depreciation of the permanent way is not admissible, as has been already decided in *The Queen v. The Great Western Railway Company*; because no part of the revenue of the company has been ever set apart for that purpose. There is nothing in the present case to distinguish it from that decision, which, therefore, must be considered binding. It is possible that the previous case of *The Queen v. The Grand Junction Railway Company* may be cited to show that such a deduction has been allowed; but the court there only decided that the deductions made were sufficient to cover every thing which ought to be allowed; but no sanction was given as to the propriety of any one of the deductions. That this is so appears clearly from the note of the reporters, at p. 24 of that case. *Crease v. Sawle*, 2 Q. B. Rep. 885.

Thirdly, as to the deduction claimed in the nature of working expenses in respect of the exchange toll payable to the South-eastern Railway Company by the appellants, for passing over the southern moiety of the common line. No allowance ought to be made on account of this assumed payment, because it is not an outgoing necessary to produce traffic on the line of the appellants, and so it

¹ The judgment in this case will be found in Hodgson on the rating of railways.

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does not in any way affect the value of the occupation of their own line. In *The Grand Junction Case*, the profit made by the company in carrying over lines belonging to other companies was considered to be a profit of trade earned as carriers, and, therefore, not properly affecting the value of the occupation in respect of which the rate was laid.

[*Wightman, J.* It is essential to the Brighton Company earning some of the profits in respect of that part of their own line which is in Croydon, that they should pass along this part of the South-eastern Railway Company's line. Can it be said, then, that the profits arising from their occupation are not increased thereby?]

The same argument might be used as to any trade carried on by the company in Croydon. They could have no right to deduct the expenses incurred in carrying it on. But the supposed rent paid by the South-eastern Railway Company to the applicants, in respect of the northern moiety of the common line so far as it is situate in Croydon, does, on the other hand, render the appellants' occupation more valuable, and, therefore, should be included in calculating the ratable value. This arrangement between the two companies as to the exchange toll is a mere private bargain; and such a claim as the present is no more allowable than where the owners of adjoining lands agree to allow the cattle of each other to depasture on their lands. *Barrington's Case*, 8 Rep. 136, *b.* *Lucy v. Levington*, 1 Vent. 175. 1 Kent's Com. 459.

Lastly, the calculation should be based upon the state of the accounts, as shown at the last half-yearly meeting of the company preceding the rate, and not on any thing which may have occurred subsequently. The 8 Vict. c. 20, s. 107, Railways Clauses Consolidation Act, 1845, requires copies of the half-yearly accounts to be sent to the overseers of the different parishes, obviously with a view of enabling them to assess the rates on the company.

[*Coleridge J.* Even if the accounts are meant to afford a *prima facie* means of calculation, what is to prevent the parish officers from getting any further information they can as to the existing state of things?]

The written accounts are much safer evidence for the overseers to proceed upon than any loose estimate which may be made of a change in the value of the stock; and it must be recollected that the great object should be to lay down such a rule as will enable the parish officers fairly to lay the rate, and so to avoid appeals against it. Any subsequent alteration in the value of the stock will be taken into consideration in calculating the next rate.

[*Erle, J.* The true criterion is, What rent would a tenant from year to year be expected to give, after making all proper deductions, at the time when the rate is made? If, between the half-yearly meeting and the time of laying the rate, the railway were completely destroyed by rioters, surely no rate could be imposed?]

In *The Queen v. The South-western Railway Company*, this rule is, to a considerable extent, sanctioned by the court. It is there said, that the existing state of things is alone to be looked to;

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whenever other states of facts arise, the rate must be altered to suit them.

[*Coleridge, J.* An account of tolls was to be there rendered to the overseers, yet that was held not to be conclusive of the rates being assessed with reference to the tolls.]

They cited *The King v. The Hull Dock Company*, 5 M. & S. 394.

Gurney and Wallinger, Serj., contra. The first question is, whether the mileage or parochial earnings' principle is to be adopted. The object is, to have one uniform mode of calculating the net annual value adopted in all the parishes through which the railway passes. The problem to be solved is, What are the net earnings of the land occupied in the parish? Two modes have been suggested of doing this. There are very great difficulties thrown on the parish officers in ascertaining the gross receipts and expenses of each parish, so as to get at the net profits earned there. In canals, where different rates of tolls exist in different parishes, it is necessary to inquire into the earnings in each, in order to give that parish where the greater toll is earned the benefit of it. *The King v. Kingswinford*. But if the same rate of toll prevails throughout the whole canal, the mileage principle is adopted. *The King v. Woking*. The present case finds that the rate of toll is the same in the respondent parish as on other parts of the line, and so that decision strictly applies. In *The Queen v. The Grand Junction Railway Company*, the court say that the mileage division is very convenient; and it is expressly sanctioned in *The Queen v. Mile End Old Town*. So far as the through traffic is concerned, the mileage principle clearly gives the true result.

[*Coleridge, J.* If the parochial earnings can be ascertained, they will be more generally correct, for, on the mileage principle, a very productive mile might be rated only at the same amount as a very unproductive mile.]

Neither can the parochial earnings' principle be carried out in all cases. Even if the receipts in each parish can be discovered, the overseers cannot find what proportion of the expenses is due to the particular parish. The question is, Which of the two methods is the most generally practicable?

[*Coleridge, J.* The mileage principle may be well applied to all outgoings common to the whole line. Perhaps those which are peculiar to one or more only of the parishes may have to be attributed solely to them.]

With the information which the company are bound to give to the overseers of the whole earnings and expenditure, the fairest and easiest mode of arriving at the net profits in each parish will be to take the gross profits of the whole line, and to deduct the expenses of the whole: this gives the whole net profits, which should be apportioned according to the mileage in each parish.

Secondly, the company are entitled to make a deduction for the average annual depreciation of the permanent way, according to the provisions of the Parochial Assessment Act. Such a deduction was made in *The Queen v. The South-western Railway Company*; but

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was disallowed in *The Queen v. The Great Western Railway Company*, under the particular circumstances of that case, and it is on that decision that the present objection to the claim is based. The grounds of that decision were two: first, that no depreciation fund was actually set aside; and, secondly, that the company had, in violation of their act, applied capital instead of revenue to renovating the permanent way. The first ground only exists here, and it is contended that the decision of that case should not be extended beyond its peculiar facts. The question of depreciation allowances is still considered by surveyors as an open question. Much of the difficulty which exists arises from not considering that the deductions provided for by the Parochial Assessment Act are purely hypothetical. What is to be deducted is, "the average annual expense necessary to maintain the land in a state to command such rent." It is quite unnecessary that any of the expenses there mentioned should have been actually paid, any more than it is necessary that the subject matter of the rate should be actually let to a tenant. Some expenses may be expected to occur at long intervals; therefore, an estimate should be made of the amount, and of the number of years over which it will extend, and an average portion deducted in each year, according to the principle of *The King v. The Hull Dock Company*. It would be quite impossible to replace *de anno in annum* the portion of the rails, &c., then destroyed. Still, a tenant would pay less for the line when the rails had greater wear, and so the depreciation would diminish the ratable value. *The King v. Tomlinson*, 9 B. & C. 163, does not lay down that a sum of money for repairs must be actually and bodily set aside, though it is clearly stated that such a deduction from the assumed rent is to be allowed. *The King v. Lower Milton*, *Ibid.* 810. There is no doubt that this property is of a perishable nature. *The Queen v. The Cambridge Gas Light Company*, 8 Ad. & E. 73; s. c. 7 Law J. Rep. (N. S.) M. C. 50.

[Coleridge, J. How can you bring this within the terms of the Parochial Assessment Act, without having set aside a sum for the purpose?]

The case finds that a greater percentage is deducted on this very account from the assumed rent of house property in Croydon, than is allowed in the case of other property not of a perishable nature; and on the same principle the probable average annual expense of replacing the rails, &c., should be here allowed, because it is certain that they must at some period require renewal. It is found by the sessions that the sum claimed will be necessary on an average to maintain the property in a state to command the rent. It is impossible to ascertain the probable average annual expense by taking a series of past years, as railways have not been in operation a sufficient number of years to make experience a test.

[Patteson, J. Then, how many years are to be taken?]

A reasonable number founded on the opinion of surveyors acquainted with the nature of the property.

[Erle, J. You may put it thus: Suppose a railway twenty miles long, of which one mile requires to be reproduced every year; that

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would come to the same thing on an average of years as if the whole required to be reproduced at the end of twenty years.]

That is so. But it is argued that, as the company would be allowed the full amount when it is expended, no injury is done by disallowing any prospective deduction. There is, however, a fallacy in that, for if the whole expense exceeded the profits of that particular year, the company would not escape being rated. *The King v. The Hull Dock Company*. Besides, that could not be considered a "probable average annual cost." Insurance may be deducted according to the provisions of the Assessment Act, but it cannot be said that it must necessarily be paid. In *The Queen v. The Great Western Railway Company*, this item is treated as landlord's improvements, and not as tenant's repairs; but even if that were so, the ground there taken is not sound, that they can only be allowed for if actually paid. That is impossible where the rate is calculated prospectively. There is no objection here raised that the expense of restoring the permanent way has been paid out of capital instead of revenue.

Thirdly, as to the exchange toll, or the supposed rent which would represent it. No doubt, the agreement between the two companies as to the use of these twelve miles is a mere private arrangement, by which the tolls payable by one company are set against those payable by the other, and therefore both or neither ought to enter into the calculation of the hypothetical rent which a tenant would give for the appellant's railway.

[*Coleridge, J.* Suppose the whole line were divided as these twelve miles are, would the company escape rating altogether?]

No; the value of their occupation, with its privileges, including that of passing toll-free along half the line, would have to be calculated; but then, on the other hand, no tolls would be taken into account for the other half of the line.

[*Coleridge, J.* Looking to the parochial earnings, you must include the tolls earned in Croydon; but you cannot deduct the tolls paid and earned in another parish.]

The payment of the latter tolls contributes to earn the profits in Croydon parish. In general, all expenditure earned along the line contributes to the profits along the whole line; but this agreement applies only to the earnings in the parishes where the exchange tolls would be earned, and if the agreement were put an end to, those parishes alone would receive the benefit of the tolls paid.

Lastly, the calculation of the hypothetical rent must be made with reference to the state of things on the day when the rate is made. The Parochial Assessment Act speaks of the rent at which the property may reasonably be expected to be let. The rate must relate to the same point of time in regard to all kinds of property in the parish, and, according to the respondents' view, the value of all property may have to be calculated on a state of things existing six months back. The company indeed are not compellable to make up their accounts oftener than once a year unless they please, and therefore, according to the principle contended for on the other side, they may themselves choose the state of accounts upon which they desire to have the rate

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calculated. If the increase in the amount of plant found to have been made between June and November did not exist, the appellants would have been obliged to incur additional expense and loss of traffic from working with an insufficient plant; therefore they are entitled to a proportionally larger deduction for the increased outlay. In *The Queen v. The Grand Junction Railway Company* it is assumed that the ratable value must be calculated according to then existing circumstances. Lord Denman, C. J., there says, "It must never be forgotten that the propriety of a poor rate can only be determined by reference to the facts found to be actually existing when it was made. *The King v. Bedworth*, 8 East, 389; *The Queen v. Westbrook*; and *The Queen v. Everest*, 10 Q. B. Rep. 202, were also referred to on this point.

Curr. adv. vult.

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ON an appeal against a rate, bearing date the 11th of July, 1848, for the relief of the poor of the parish of Westbere, in the county of Kent, in which rate the South-eastern Railway Company were rated as owners and occupiers of a part of a branch of the South-eastern Railway Company, (which branch railway runs from the said South-eastern Railway near Ashford to the city of Canterbury and the towns of Ramsgate and Margate, in the county of Kent,) which part of the said branch, in respect of which the said company are rated as aforesaid, extends in length two hundred and two and a half chains within the parish of Westbere, and was rated in the said rate at the sum of 1260*l.*, being at the rate of 500*l.* per mile, the Court of Quarter Sessions for the eastern division of the county of Kent confirmed the said rate, subject to the opinion of the Court of Queen's Bench upon the following case:—

The South-eastern Railway Company was established and incorporated under that name by 6 & 7 Will. 4, c. 75. By 7 & 8 Vict. c. 25, intituled, "An Act to enable the South-eastern Railway Company to make a railway from the said South-eastern Railway, near Ashford, to the city of Canterbury and the towns of Ramsgate and Margate, and to join the Canterbury and Whitstable Railway," the South-eastern Railway Company were empowered to make such last-mentioned railway. [Copies of these acts accompanied the case, and were to be taken as part thereof.] The South-eastern Railway Company have obtained several other acts of Parliament, and under the powers contained in their acts, or some or one of them, the company have completed the present main line of the South-eastern Railway, leading from the London and Croydon Railway to Dover, and several branches communicating therewith, and, amongst other branches, a branch leading from the said main line of the South-

¹ 20 Law J. Rep. (N. S.) M. C. 137.

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eastern Railway, near Ashford, to the city of Canterbury and the towns of Ramsgate and Margate, and joining the Canterbury and Whitstable Railway. The said branch railway leading from the said main line passes for the length of two hundred and two and a half chains through the parish of Westbere. There is no station in the parish of Westbere. The total number of miles open for traffic upon the main line of the South-eastern Railway, together with the branches communicating with it, is one hundred and sixty-one. The said company are in the exclusive occupation of the main line and branches. They provide locomotive power and carriages, and carry on the business of conveying passengers and goods for hire upon the said main line and branches; such conveyance of passengers and goods for hire is the only source of profit or revenue arising to the company from the main line and branches. The above-mentioned main line, and also the branches, extend through a great number of parishes. The stations and buildings throughout the main line and branches are rated separately from the railway. Throughout the main line and branches the expense of repairs and maintenance of the railway may be taken as proportional to the length in the parish, as compared with the whole length of the main line and branches. The traffic, both in passengers and goods, is much greater upon the main line than upon any or either of the branches, and the greater part of the traffic upon the main line never passes over any part of the branch railway which runs through the parish of Westbere. The traffic, both in passengers and goods, over any one mile or portion of a mile, upon any part of the main line, is greater than the like traffic over an equal length of the line of railway in any part of the parish of Westbere, and the expense of conveying passengers and goods, and the rate of charge by the company for such conveyance, may be taken as the same throughout the whole of the main line and branches; that is to say, with respect to passengers, in proportion to the distance travelled by each passenger, and with respect to goods, in proportion to their weight and the distance they are carried along the line of railway, whether it be the main line or any one of the branches. The annual net profits of the company, both from the passengers and goods' traffic, over any one mile or portion of a mile of the main line, exceed those arising from the like traffic over any equal length of the line of railway in the parish of Westbere.

By the rate above mentioned, the company were rated, in respect of the two hundred two and a half chains of the line of the branch railway which runs through the parish of Westbere, in the sum of 1260*l.*, being at the rate of 500*l.* per mile. The rate above mentioned was made and based upon the mileage principle; that is to say, by first ascertaining the gross receipts of the company from the traffic upon all the lines of railway in their occupation, as well the main line as the branches, considered as one entire concern; by deducting from such gross receipts the usual expenses and allowances upon all such lines and branches, considered as one entire concern; by treating the residue or balance of such gross receipts, after such deduction for expenses and allowances, as the net rent or fair ratable value of

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the whole of the main line and branches; and by dividing the same among the several parishes upon the mileage principle, allotting as the ratable value of so much of the branch line of railway as lies in the parish of Westbere such a proportion of the ratable value of the whole of the main line and branches, ascertained as aforesaid, as the length of that portion of the railway which lies in the parish of Westbere bears to the length of the whole main line and branches together.

The respondents contended that, under the circumstances, the above was the proper mode of ascertaining the ratable value. The appellants, on the other hand, contended that the rate ought to have been based on the principle of parochial earnings; that is to say, that they ought to have been rated at such a sum as a tenant might be expected to give as annual rent for that portion of the branch railway situate within the parish of Westbere, (regard being had to the net revenue earned by the portion of the railway situate within that parish,) such rent being ascertained by taking the gross annual receipts of the company arising from that portion of the Ashford, Ramsgate, and Margate branch line of railway situate in Westbere parish, such gross receipts being ascertained by taking a proportion of the fare paid by every passenger who has during the course of the year been carried by the company over any part of the railway in Westbere, such proportion bearing the same ratio to the whole sum paid by such passenger for his fare for the whole distance travelled by him over the company's main line and branches, as the distance travelled by him in Westbere bears to the whole distance travelled by him on the company's main line and branches; and also by taking a proportion of the gross receipts for goods' traffic in Westbere, calculated on a similar principle; then by taking from such gross receipts for passengers and goods' traffic in Westbere the deductions prescribed and directed by the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, according to the mileage principle, applied to such Ashford, Margate, and Ramsgate line only; the result showing the rent which a tenant might reasonably be expected to give for the portion of the railway situate within Westbere, which mileage principle the appellants contend gives the nearest approximation to the actual expenses and usual allowances in respect of the respondent parish which can with any certainty be arrived at.

If the court should be of opinion that, under the circumstances, the mileage principle contended for by the respondents is the proper one, then the sessions found that the sum of 1260*l.* is the proper ratable value of that part of the branch line of railway which is situate in Westbere, and the rate was to stand confirmed; but if the court should be of opinion that, under the circumstances, the mileage principle contended for by the respondents ought not to have been adopted, or that the principle contended for by the appellants is the correct principle, then the sessions found that the sum 506*l.* is the proper ratable value of that part of the branch line of railway which is situate in the respondent parish, and in that case the rate was to be amended by reducing it to that amount, and the order of sessions

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confirming the original rate was to be reversed. The court to have the power of amending, quashing, or otherwise dealing with the rate, as they might deem right.

Horn, in support of the order of sessions.¹ Two questions are raised by this case: first, whether the main line and branches should be treated as one entire concern in assessing the rate; and secondly, whether the mileage principle or the parochial earnings' principle is correct. First, the main line and branches are worked by the company as one concern, and all the earnings are blended together; therefore, it is right that, for the purpose of estimating the value of the occupation, the whole should be treated as one concern. If this course be not adopted, a difficulty might arise as to which is the main and which the branch line; a loop might exist, or lines might diverge to two equally important places. Therefore, the sessions were right in adopting the view of the respondents in this particular. Secondly, the mileage principle is the only one which can possibly be applied to ascertain the net profits of a railway; the method of ascertaining the net earnings in each parish is quite impracticable. *The King v. Kingswinford*, 7 B. & C. 236; s. c. *nom. The King v. The Dudley Canal Company*, 6 Law J. Rep. M. C. 3, will no doubt be relied on by the company; but that was the case of a canal, which differs materially from a railway. In a canal it is not difficult to find the proportion of tolls earned in each parish; but on a railway, with a multitude of stations and traffic passing from each one of these stations to each of the others, it would be quite impossible for the overseers to arrive at any just estimate, even if they had all the company's books produced to them. There is nothing to prevent the company from altering their fares from month to month. Parish officers must proceed on some fixed and certain principle; they must not lay the rate at a venture. *The King v. Topham*, 12 East, 546. In *The King v. Woking*, 4 Ad. & E. 40; s. c. 5 Law J. Rep. (n. s.) M. C. 17; and *The Queen v. The Cambridge Gas Light Company*, 8 Ad. & E. 73; s. c. 7 Law J. Rep. (n. s.) M. C. 50, the aggregate of ratable value was divided, not according to the receipts in each parish, but according to the quantity of land occupied in each parish. In the latter case the court say, "It is true that in the case of a canal, where the tolls varied in different parts of the line, it was decided that a rate could not be made upon the company in each parish according to the length of the canal in it, and for that reason, in *The King v. Kingswinford*, which is a case very recently before this court, where the tolls were the same throughout the whole line, it was held, that the proportion to be paid by the company in any given parish along the line must be ascertained by a mileage calculation. *The King v. Woking*." Those remarks are applicable to the present case. If, however, the mileage principle, contended for by the respondents, be adopted, it gives a simple and fair mode of arriving at the net

¹ May 1, 1850, before LORD CAMPBELL, C. J., PATTESON, WIGHTMAN, and FALKE, JJ.

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annual value of the occupation in the parish. The accounts of the gross receipts which the company are bound to keep and furnish to the overseers afford a plain mode of estimating the net profits of the concern. This question has never been expressly decided. In *The Queen v. The London and South-western Railway Company*, 1 Q. B. Rep. 558; s. c. 11 Law J. Rep. (N. S.) M. C. 93, the mileage principle was not material to the main point in the case, which was, whether the rate should be laid on the tolls only; and in *The Queen v. The Grand Junction Railway Company*, 4 Ibid. 18; s. c. 13 Law J. Rep. (N. S.) M. C. 94, it was admitted to be the correct mode; so also in *The Queen v. The Great Western Railway Company*, 6 Ibid. 179; s. c. 16 Law J. Rep. (N. S.) M. C. 145, where, as the branch lines were worked at a loss, it would have been very much to the interest of the company to question the correctness of the mileage principle; but no such point was there raised, and it may therefore be presumed that it was considered to be too well established to be questioned.

Rose, contra. The rate cannot be supported. From *The King v. Kingswinford* downwards, the question has always been, What is the value of the occupation in the rating parish? And that principle of rating is recognized and sanctioned by the Parochial Assessment Act. Here there is a parish including only a portion of a branch line upon which it is expressly found that the profits fall far short of those earned on the main line. The profits on which the rate is to be calculated are those arising within the rating parish. *The King v. Milton*, 3 B. & Ald. 112. *The King v. Barnes*, 1 B. & Ad. 113. If so, the respondent parish has no right to any of the profits earned on the main line. Secondly, the mileage principle cannot be adopted. There is no real distinction between the present case and *The King v. Kingswinford*. The only difference suggested is, on the score of there being a greater difficulty of ascertaining the net parochial earnings in the case of a railway than of a canal, but that is no reason for the parish officers adopting an improper mode of assessment, such as the mileage method is decided to be, wherever, as here, the profits vary in different parishes. There may be cases where the mileage division gives a correct result, but that is only where the profits earned and expenses incurred on each mile are the same, where the result is correct, because it gives the net earnings in each parish, or, in other words, the rent which a tenant would give for that portion of the whole concern, he being placed in the same situation with respect to the residue as the company. In *The King v. Woking*, the principle of *The King v. Kingswinford* was distinctly recognized, but the tolls paid for passing over the parts of the canal not in the respondent parish were there excluded, and as all the tolls paid for traffic passing through the parish were the same throughout, the mileage mode of apportionment gave a correct result. So also in *The Queen v. The Cambridge Gas Light Company*, it could not be said that the profit received for the supply of gas was earned by one portion of the pipes more than another. *The Queen v. The London and South-western Railway Company* is the only case in which this

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question has been disputed in regard to railways, and, so far as it goes, it is in favor of the appellants' argument. The principle of apportioning the ratable value according to the net profits earned is clearly laid down in *The Queen v. Mile End Old Town*, 10 Q. B. Rep. 208; s. c. 16 Law J. Rep. (N. S.) M. C. 184; and *The Queen v. The Hammersmith Bridge Company*, 18 Law J. Rep. (N. S.) M. C. 85.

[*Erle, J.* How can the expenses occurring within a parish be apportioned?]

There may be some practical difficulty in doing this, but it is not necessary for the company to establish any other principle of rating. It is sufficient for the present case to show that the principle affirmed by the sessions leads to an erroneous estimate of value in the rating parish.

Cur. adv. vult.

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ON an appeal by the Midland Railway Company against a rate, bearing date the 16th of February, 1849, made for the relief of the poor of the parish of Basford, in the county of Nottingham, whereby the said company were rated in respect of their occupation of one and three fourth miles of railway in that parish, the Quarter Sessions for the said county confirmed the rate, subject to a case, which stated that the whole length of railway belonging to and worked by the Midland Railway Company runs through several counties and many parishes, and is in length four hundred and fifty-three miles. It is a public iron railway, made, maintained, and worked in the usual manner, for the conveyance of passengers and goods in carriages moved by locomotive engines, under the several acts of Parliament (local and personal, public) touching the Midland Railway Company and the general railway acts. Part of the railway, to the extent of one and three fourths miles, lies in the parish of Basford, in the county of Nottingham; and it was against a rate for the relief of the poor of this parish, made upon the company in respect of this one and three fourths miles of railway, that the appeal was had. At the time of the appeal, the point in dispute between the parties was as to the principle upon which the ratable value of the occupation by the company of the one and three fourths miles of railway lying in the parish of Basford ought to be ascertained. The principle contended for by the respondents was, that the ratable value ought to be estimated upon what is called the mileage principle; that is, by calculating the total ratable value of the occupation by the company of the whole line of the Midland Railway, including the one and three fourths miles in question, and then dividing that amount by the number of miles of the whole line, so as to obtain an average of the ratable value of the occupation of each mile; and that, consequently, the

¹ 20 Law J. Rep. (N. S.) M. C. 140.

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ratable value of one and three fourths miles of the railway occupied by the company in Basford would bear the same proportion to the total ratable value of the whole Midland Railway as one and three fourths bears to four hundred and fifty three.

The principle contended for by the appellants was, that the ratable value of the one and three fourths miles of railway occupied by the company in Basford ought to be estimated with reference solely to the net profits earned by the railway within that parish, and without any reference to the amount of net profits earned elsewhere, or to the ratable value of any portion of the railway lying in any other parish. The rate has been made upon the principle contended for by the respondents. It was admitted by the respondents that if the principle contended for by them was incorrect, the company were overrated, and that the assessment of the appellants ought to be reduced. It was admitted by the appellants that if the principle contended for by the respondents was correct, the company were not overrated, and that the rate was good. The Court of Quarter Sessions, by their order, confirmed the rate, subject to the opinion of this court. If this court should be of opinion that the principle contended for by the respondents is correct, then the order of the Court of Quarter Sessions was to be confirmed. If the court should be of opinion that the principle contended for by the respondents is incorrect, then the order of the Court of Quarter Sessions and the rate were to be quashed.

Hall and Denison,¹ in support of the order of sessions. This case raises the abstract question, whether the mileage principle is or is not correct. The sessions adopted that mode of calculation, and it is at all events an approximation to what a tenant would give as rent for the portion of the line in the respondent parish, and for all practical purposes a mileage apportionment of the gross receipts and gross expenses of the whole line will give a sufficiently accurate result. Railways are a peculiar property, and in applying the principles of rating to them, it will be necessary to distinguish not to overrule previous decisions.

[*Coleridge, J.* The parochial assessment act seems to have been passed without reference to such species of property.]

The great difficulty in cases of this kind has arisen from applying the principle used in the simple case where the subject lies in only one parish, to the complex case where it extends through several parishes. The question of distributing the ratable value first occurred in *The King v. The New River Company*, 1 M. & S. 503; and in *The King v. Kingswinford*, 7 B. & C. 236; s. c. *nom.* *The King v. The Dudley Canal Company*, 6 Law J. Rep. M. C. 3, it was applied to canals, in which, no doubt, the court decided that the true criterion was the net profits earned in each parish. But the same principle cannot be adopted in railways, in which the items necessary for the calculation cannot be obtained by the parish. Traffic takers stationed on the banks of a canal may form a reasonable estimate of the traffic

¹ May 29, before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and ERLE, JJ.

which passes, but such a mode would be quite useless if applied to railway traffic. It is next to impossible to ascertain local *profits*, and it is quite impossible to ascertain local *outgoings* and expenses, which vary with the several embankments, tunnels, &c.; therefore some mode of estimating them approximately must be allowed, and the mileage principle supplies the best practicable method. The assistance which the legislature has provided extends only to the total receipts and total expenditure, 7 & 8 Vict. c. 20. s. 107. Any other information can only be obtained by the overseers on the trial of an appeal. *The Queen v. The Cambridge Gas Light Company*, 8 Ad. & E. 73; s. c. 7 Law J. Rep. (N. S.) M. C. 50, is the authority upon which the mileage principle rests.

[*Erle, J.* There the court avoid laying down any principle as to the *quantum* of appointment; they only say that every parish in which there is any pipe is entitled to some rate.]

The land occupied by the pipes entitles a parish to rate, even though no profit is received in it, and it is directly decided that the distribution must be according to the quantity of apparatus in the respective parishes. Here the length of line in each parish represents the quantity of apparatus in that case. In *The Queen v. Mile End Old Town*, 10 Q. B. Rep. 208; s. c. 16 Law J. Rep. (N. S.) M. C. 184, that case was supported, and the mileage principle directly affirmed. The three previous cases decided as to railways do not militate against this argument. *The Queen v. The London and South-western Railway Company*, 1 Ibid. 558; s. c. 11 Law J. Rep. (N. S.) M. C. 93, professed to proceed solely upon the facts there found, and it was there assumed that lines of railway could never be practically open to rival carriers. The sole dispute was, whether the rent which a tenant would give was to be calculated on the basis of the whole receipts or of the tolls only. In either case the reasonable amount of the rent was found, and no objection as to the difficulty of ascertaining the local receipts and outgoings was raised. Then, in *The Queen v. The Grand Junction Railway Company*, 4 Ibid. 18; s. c. 13 Law J. Rep. (N. S.) M. C. 94, the mileage principle was adopted by consent, and sanctioned by the court as a proper mode of calculation; and in *The Queen v. The Great Western Railway Company*, 6 Ibid. 179; s. c. 16 Law J. Rep. (N. S.) M. C. 145, a mixed method was agreed to, viz., by ascertaining the actual gross receipts in the parish, and deducting a mileage proportion of the whole gross outgoings, taking the difference as the net profits earned in the parish. The alternative offered in this case by the company is, that the net profits earned in the parish should be ascertained, independently of any profits earned elsewhere; but that is quite inconsistent with what is said in *The Queen v. The London and South-western Railway Company*, where the case is put of an inn in parish A connected with a tap in parish B, and in estimating the rent which would be given by a tenant of the inn, the advantages derived from the tap in the adjoining parish must be taken into calculation.

[*Coleridge, J.* The mileage principle is almost certain to do some injustice to other parishes not before the court at the time.]

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M. D. Hill and Willmore, contra. The sole question now raised is, whether this rate is calculated on a correct principle. It is quite immaterial to the present argument whether the appellants' method is the true one, otherwise than as illustrating the fallacy of the mileage principle; if the respondents are not right, the order of sessions is to be quashed. The object to be attained is to find the real value of the occupation in the parish, and the provisions of the Parochial Assessment Act are merely means to that end.

[*Lord Campbell, C. J.* You might assume the part of the line in the respondent parish to be in the hands of a stranger, and consider what the company would give to rent it.]

That would be a proper test, and if it is applied it will be seen that the net earnings in any other parish cannot affect the amount of that rent. *The Queen v. The Bristol Dock Company*, 1 G. & D. 76; s. c. 10 Law J. Rep. (N. S.) M. C. 105. *The King v. The Trent and Mersey Canal Company*, 1 B. & C. 545.

[*Lord Campbell, C. J.* The value of the land in the parish may vary very much by reason of its connection with land in other parishes.]

The principle which is sanctioned in rating canals should be applied to railways. In both species of occupation, the amount of profit earned is in exact proportion to the length of user; traffic that passes along twenty miles pays twenty times the amount which traffic passing along one mile pays. But in water and gas works the case is very different; there the consumer does not pay more in consequence of a greater distance being travelled by the water or gas. Therefore it is that in canals and railways the *quantum* of user or amount of profit earned in the parish is to be considered; but in water and gas works the profit being earned in respect of the whole transit, it may be well apportioned according to the length of pipe in each parish; and *The Queen v. Mile End Old Town* shows, that even in those cases the principle of parochial earnings has been looked to as the ultimate question to be ascertained. *The King v. Lower Milton*, 9 B. & C. 810; s. c. 8 Law J. Rep. M. C. 57. *The King v. Chelmer*, 2 B. & Ad. 533. The mileage principle is entirely at variance with the principle laid down in *The King v. Nicholson*, 12 East, 330. They referred to a passage in *The Queen v. The Bristol Dock Company*, cited in a note to *The Queen v. The London and South-western Railway Company*, 2 G. & D. 53; s. c. 11 Law J. Rep. (N. S.) M. C. 93.

But it is not impossible to ascertain the net earnings of each parish. Suppose the whole line is one hundred miles, one mile of which lies in the rating parish, by taking the portion of the fare which is received by every train in respect of that one mile, the gross earnings will be found; and then there must be deducted all expenses peculiar to that mile, (if any,) — for instance, a stationary engine necessary to draw trains up a steep incline there, — besides, there must be deducted a proportion of all such expenses as are common to the whole line, such as the expenses of the board of directors, which may well be apportioned on a mileage calculation. The result, after making these deductions, will be the net earnings in the rating parish.

[*Coleridge, J.* How are the parish officers to make this calculation? We must look to what it is possible for them to do.]

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There is no greater difficulty than in rating canals, and such a calculation was actually made in *The Queen v. The London, Brighton, and South Coast Railway Company*, 20 Law J. Rep. (N. S.) M. C. 124; ante, p. 329. *The King v. The Oxford Canal Company* principally turned on the deductions proper to be allowed.

[*Patteson, J.* Your argument would render it necessary to take an estimate of every passenger going on every journey.]

They cited *The King v. Parrott*, 5 Term Rep. 593, adopted in the *Great Western Case*.

Cur. adv. vult.

Judgment was now delivered in the three cases by

COLERIDGE, J. These cases have stood over for consideration for some time: the first was argued before all the present members of the court except my Lord Campbell, and as it raises the only question which is for decision in the other two, it will be convenient to dispose of it first. Our judgment on that point in this case will dispose of the other two cases.

The first question is, as to the principle on which the rate was to be imposed, whether upon what has been called the mileage principle, that is, by treating the whole line of railway (trunk and branches) as one entire subject matter, and the whole ratable value, however constituted, as entire, and then, for the purpose of rating, dividing it among the several parishes simply according to the distance which the line passes through each; or upon the ordinary principle of ascertaining the actual ratable value of the land occupied by the company in each parish, by the rules which are applicable to any other land occupied by any other bodies or persons for other purposes. The judicial decision of this question has hitherto been avoided by agreement and mutual concession; and we have delayed to pronounce our judgment on it, not so much from the difficulty of determining the rule of law, as from that which arises on its practical application. This presses particularly against what is called the parochial principle. How are you by any means now in the power of parish authorities to ascertain the particulars of profit and outgoings, from a comparison between which the ratable value of the land occupied is to be deduced; both profit and outgoings being affected by circumstances spread through the whole line? On the other hand, against the mileage principle is to be urged, that, although as regards the railway company — an entire body with an entire interest — it is matter of indifference how you divide a rate assumed to be entire for the whole line; yet, as the parishes are bodies with separate interests, there is a manifest injustice in attributing to the same space of land the same proportionable share of the whole rate every where, the land in the several parishes notoriously earning the profits and occasioning the outgoings in very different proportions; because you cannot do this without depriving some parishes of what they should receive, in order to give to others what they should not. If, however, the legal principle be ascertained, it is clear that the difficulties in applying it, or even the practical imperfection which circumstances may occasion in applying

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it, are not to influence our decision. It is unnecessary to consider what the force of the argument would be, if it could be shown that there was an absolute impossibility of applying it, for nothing like that exists in the present case.

Now, upon the legal principle we have no doubt. The poor rate and the principles of its assessment are entirely statutory. The 6 & 7 Will. 4, c. 96, made expressly with a view "to establish one uniform mode of rating for the relief of the poor," prescribes the rule; the rate must be made on "an estimate of the net annual value of the several hereditaments rated thereunto," such value to be arrived at in the manner stated in the 1st section; the subject is parochial; the inquiry is to be conducted by parochial authorities with limited powers; if any matters specified in the section are locally situate without the parish, that is, if any such affect the amount of "the net annual value" or "rent reasonably to be expected," they will, of necessity, fall within the range of the inquiry, but beyond this the principle does not go. This principle, so limited and understood, was not first created by the statute just mentioned; the court had decided so early as in 1827, in the case of *The King v. Kingswinford*, that it was to be found in the original statute of Elizabeth; and since that decision it has been uniformly applied to cases where the same party, whether company or individual, occupies in different parishes land forming one entire property, such as a canal, though the profits may be earned in different proportions and with a different rate of outgoings in each; the value which the land occupied in each parish produces, after the due allowance, is that upon which the occupier is to be rated in each.

It is unnecessary to cite more authorities in support of a proposition now become settled; the decisions will be found to flow in a remarkably uniform current since the case last cited. Whether the circumstances of railways, which were in 1836 a comparatively infant interest, escaped the notice of the legislature, or were advisedly thought not to need any special provision, certain it is that none was made; and as, in its broad principles, the occupation of a railway company does not differ from that of a canal company, a court of law has no choice but to apply to it the same general law under which in its terms it certainly falls.

It is to be remembered, that the amount of assessment on a particular occupier is a question between that occupier and the rest of the contributors to the whole rate; and the consideration of that occupier's relation to the contributors to another rate in another parish is irrelevant to this question; he may be rated in that other parish too high, or too low, but this is a matter which does not interest the contributors to the first-named rate, nor have they influence in the settlement of it. And this suggests the answer to a difficulty raised on the argument in this case. If you give Croydon the full benefit of all the earnings made by the railway in the parish, what is to be done in the case of a parish on some branch line, in which the company may work at a loss? The answer is, that the case must be decided, when it arises between the company and that parish, on the same principle precisely as the present, without reference to Croydon.

This is quite distinct, however, from the consideration of any expenses, *wherever arising*, which the occupier can show to be necessary for keeping the hereditament which is the subject of the assessment at the value which is made the measure of it. The language of the statute is quite general on this point, and lets in all considerations which are necessary for the just protection of the company in each parish.

Whatever difficulty there may be in applying the principle, it has been in fact overcome in the present case; here, under circumstances more than commonly complicated, the sessions have presented us with calculations to meet the parochial as well as the mileage principle; they are exclusively the judges of the fact, and we must assume that they have been able to arrive at a just conclusion. Nor, indeed, does it appear to us under any circumstances to be insuperably difficult to impose the rate fairly, if only the interested parties will deal candidly with each other. We cannot assume that they will deal otherwise; but if the company should improperly refuse to the overseers of any parish information which it is in their power to afford, and is proper to be afforded for the purpose of fixing the assessment on them justly, they must, if properly dealt with, be the sufferers. The 257th section gives the overseers a right under a very stringent penalty to the inspection of certain accounts which the company are by the same section compelled to keep under another serious penalty. These accounts would suffice for a rude assessment, deficient indeed in making due allowance for outgoings, but that deficiency would press on the company itself. By the 192d section, however, they are required to keep and make up half yearly a particular account of the money received by, or for the use of, the company; of the charges and expenses attending the *making, maintaining, and carrying on of the undertaking*; and of all other the receipts and expenditure of the company up to the period of making up the account. The materials for making up this account must be in the possession of the company, and although they are not required to produce either to the overseers, it is manifestly their interest to do so; because out of them is to arise the evidence on which the claim for deductions must be supported; and if they will not afford the information necessary for these being duly made, they must expect that any court of justice will presume against them; it is but fair to intend that the evidence which they withhold would not, if produced, have warranted greater deductions than those already made. There is, moreover, the further substantial consideration, that in all litigation, even if successful, they must, as considerable rate-payers, at all events, contribute very largely to their opponents' expenses; these circumstances, it cannot be doubted, will have their practical weight.

On these broad principles, therefore, that the statute provides but one rule, and intends to secure uniformity; that we have no power to substitute another; that the decisions heretofore are consistent; and that there is no insuperable difficulty in the practical working of the rule, we are of opinion that the respondents are right in their principle of assessments, and that upon this point our judgment must be for

them. We may observe that by the Railways Clauses Act, 8 & 9 Vict. c. 20, s. 107, railway companies within its operation are bound to make up annually an account showing the total receipts and expenditure under the several distinct heads, and transmit a copy to the overseers of every parish through which their lines pass.

The second question submitted to us is on the right to a deduction from the ratable value, in order to countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the supposed rent, which is the measure of the assessment. As a general principle, we do not understand the respondents to deny that a deduction for the purpose here stated, and as stated, is proper to be made; the objection which they raise to the particular claim of the company is founded on two circumstances: first, that the proper provision is already made under a head called "working expenses," to which we do not agree; secondly, that if more may be at any time necessary, the necessity has not yet arisen, because the company has not yet incurred the expense, nor laid by from their receipts any sum to meet it when it shall arise. This question, under nearly the same circumstances, came before the court in the case of *The Queen v. The Great Western Railway Company*, and was decided against the company; but we are desired to review that decision. We there said that we thought such an expense, as distinct from mere annual repair, fell under the same principle, and was an unobjectionable head of deduction when it should either be actually incurred or provided for; but we thought that as no allowance would be made for annual repairs in any year in which no repairs took place, so none should be made for this annual depreciation in value, unless at least there were funds set aside to meet it when it should be thought expedient to do the work of renewal. In that case, too, there was a further circumstance which had some influence on our judgment, and which is not found here, that whatever expense had been in fact incurred, the company had chosen, rightly or wrongly, at all events conclusively on themselves, to make a charge on their capital, and not on their receipts, converting it therefore into landlord's improvements, rather than tenant's repairs.

The difficulty which we now feel arises from the same fact, that no charge has in fact, either by way of outlay or setting apart, been made on the company's receipts. If the depreciation be, as probably it is, both certain and capable of an annual average, though not proper to be, in fact, repaired annually, we think it should be met by laying by a certain sum annually; and that, if the company, in order to swell their dividend, or for any other motive, neglect to do so, they act unlawfully in one of two ways; either they make a dividend which in substance impairs their capital, because they throw a burden on the latter which ought to be deducted from the former, (and this is in violation of the 193d section of their act,) or they cast the whole burden of a heavy restoration of the permanent way on the dividend of some future year, to the manifest injury of the then proprietors, and for the unfair benefit of the present body. In such case, too, there may possibly arise some difficulty in resisting the claim to be

allowed the whole deduction from the rate of the year in which the expense shall be actually incurred; although it would be manifestly unjust to allow it twice over, first in detail annually, and then in the lump. This difficulty was met in the argument by instancing the ordinary case of house property; as to which a larger difference is made between "gross estimated rental" and "ratable value" than in the case of land, on account of this very annual depreciation of the thing itself, and the necessary prospective restoration; and yet, it was said, you never inquired whether the owner did, in fact, lay by a portion of his annual rent to meet that distant expense.

We have considered this question with much attention, and, upon the whole, we think that the company are entitled to a deduction on this head. We cannot make a substantial distinction between this and house property, or any other of a perishable nature, which must require renewal. And although we think that the company ought to set apart the sum which they claim to deduct, we cannot compel them to do so in this indirect way; and we think that whenever the time shall come for actually making the restoration, they will be estopped from claiming more than that annual deduction which they now insist on, exactly as a landlord could not claim to deduct the expense of restoration made by him of a house. The rate, therefore, will be amended by a reduction according to the calculation made by the sessions in this respect.

The third question arises on what is called the exchange toll. The substance of the transaction between the appellants and the South-eastern Company, out of which this arises, appears to be this: that the traffic of the latter is to pass free over a certain portion of the line of the former, in consideration of the traffic of the former passing free over a certain portion of the line of the latter. A certain distance, between two and three miles, of the appellant's line, within the parish of Croydon, is affected by this arrangement. We think that the sessions rightly decided this to be rent in kind earned by this land; it seems to us exactly the same in substance as if so many tickets were daily issued without money paid for them to the South-eastern Company, in return for so many received from them; the tickets mutually transferred would on either side represent so much money earned. But, then, we think these earnings must be subject to exactly the same deductions as if they were received in money. The rate, therefore, will in this respect be amended according to the principle now laid down.

The only remaining point in this case turns upon the narrow question, from what date the overseers ought to make their calculations as to the assessment on the company. The date of the rate is the 20th of November, 1847, and as regards the company it is based on a half-yearly statement published by them on the 10th of August, but made up only to the 30th of June, preceding. In the interval between the 30th of June and the 20th of November the value of the working plant of the company had been, (as the sessions have found,) not improperly, increased from 260,000*l.* to 350,000*l.* The deduction on this outgoing the company claim to be entitled to; and we think

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they are entitled to it. If this allowance had been attended with the consequence of quashing the rate, we should have been of a different opinion; but as the rate may be amended, the sessions ought to avail themselves of every light that can be afforded them down to the latest period antecedent to the actual making of the rate, in order to bring it to the greatest possible accuracy. The overseers in making a prospective rate are to make it on the supposed prospective value, ascertained by them as well as they can from the latest evidence in their power as to antecedent value; it cannot be required of them that the assumed value and the actual value should correspond with perfectly minute accuracy, and they were quite justified in making their rate on the latest published account, if that was the latest information they had or could be reasonably expected to procure; and we should not think a rate ought to be quashed where this had been done; but if the company had communicated to them this new fact before the rate was made, no doubt they ought to have taken it into account if they believed it, and if they did not, and on appeal the company had satisfied the sessions of the fact, the appeal ought to have succeeded. So now, and equally, we think, if the sessions are put in possession of a fact which existed before the rate was made — as it is not the absolute duty of the company to volunteer information — if the fact will have the effect of reducing the assessment, and approximating it more nearly to actual accuracy, they should amend the rate accordingly.

We have now disposed of all the questions of principle raised in this case; the sums and quantities the parties will have no difficulty in settling according to the statements in the case.

Rate to be amended in the Brighton Case.

Rate to be amended in the South-eastern Case.

Order of sessions and rate to be quashed in the Midland Case.

REGINA v. THE INHABITANTS OF KNARESBOROUGH.¹

Hilary Term, January 22, 1851.

Settlement by Estate — Displacing of previous Settlement — Forty Days' Residence — Last Place of Residence — Fluctuating Settlement.

The father of a pauper had gained a settlement in the township of B. on the 6th of April, 1837, by renting a tenement. He had also been the owner of a freehold estate in the township of C. for some years before and down to 1838; and it was admitted, that on the 27th of April, 1837, he had resided and slept for more than forty days upon his estate in C. since the purchase of it, several days' residence between the 6th and 27th of April, 1837,

¹ 20 Law J. Rep. (n. s.) M. C. 147. 15 Jur. 398.

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being included in the computation of such forty days. An order for removal of the pauper to C., as the place of his derivative settlement, was obtained on the 28th of November, 1849:—

Held, that the residence in C. had the effect of superseding the settlement gained in B., and of establishing a subsequent settlement in C., to which the pauper might properly be removed.

THIS was an appeal against an order dated the 28th of November, 1849, for the removal of J. W., his wife, their two children, and an illegitimate child of his wife, from the township of Knaresborough, in the West Riding of Yorkshire, to the township of Coneythorpe, in the said Riding. The sessions quashed the order, subject to the following case:—

In 1828, the father of the pauper purchased a freehold house, out-buildings, and thirteen acres of land in the township of Coneythorpe, and the same were conveyed to him in fee for 800*l.*, which was *bona fide* paid, and were occupied by him from that time until and throughout the years 1836-8. The father also hired, rented, and occupied a dwelling-house, out-buildings, and twenty-six acres of land, in the township of Cattal, in the said Riding, at the yearly rent of 46*l.*, for one whole year from the 6th of April, 1836, to the 6th of April, 1837, and duly paid the said rent. During the same year he was duly rated in respect of such premises to the relief of the poor of the township of Cattal, and duly paid the said rates, and actually occupied the premises for the whole of the said year, under the said hiring. He also slept for more than forty days in such year in Cattal, and thereby gained a settlement and was settled in Cattal on the 6th of April, 1837. The township of Cattal is about six miles from Coneythorpe. There was no sufficient evidence to show where the father had slept on the night of the 5th and 6th of April, 1837, but it was admitted that between the 6th and the 27th of April, 1837, he had resided and slept on his said estate in Coneythorpe for several nights. It was also admitted that the father of the pauper had, on the 27th of April, 1837, resided and slept for more than forty days upon his said estate, since the purchase thereof, in Coneythorpe. It was admitted further, that the father, from the time of the purchase of the said estate until the making of the said order, resided within ten miles of Coneythorpe. The pauper continued to be a member of his father's family until the 27th of April, 1837, on which day he became emancipated, and had done no act to gain a settlement in his own right.

If this court should be of opinion that the settlement of the pauper, as derived from his father, was in Coneythorpe, the order of sessions was to be quashed; but if in Cattal, then the order of sessions was to be confirmed.

Pashley, in support of the order of sessions. The days of residence prior to the 6th of April, 1837, and those subsequently, cannot be coupled in order to establish a settlement in Coneythorpe. There was a settlement gained on the 6th of April in Cattal by renting a tenement, and it has always been considered that the acquisition of

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one settlement destroys all previous settlements from the time that it is acquired. A pauper cannot have two settlements at the same time, nor can the settlement be made to shift about.

[*Coleridge, J.* In the case of a settlement by apprenticeship, where there is a residence for forty days in one place of settlement, and a residence for forty days in another place of settlement, and then a residence for one day in the former place, such former place would be the place of settlement.]

In that case, the residence applies only to one head of settlement. But here it is sought to make out a fluctuating settlement under different heads of settlement. The shifting point in the law of settlement is only allowed for the purpose of securing to the pauper one place of settlement, and ought not to be extended. When the pauper has gained a settlement, as he did here by his father's complete residence in Cattal, such settlement should have the ordinary effect of displacing all previous right to another place of settlement. He referred to *The King v. Brighthelmston*, 5 Term Rep. 188; s. c. 1 Nolan, 583, and the 13 & 14 Car. 2, c. 12, s. 1.

Overend and Pickering, contra, were not heard.

LORD CAMPBELL, C. J. I am of opinion that a subsequent settlement in this case was gained. A man cannot have two settlements at the same point of time, but his right to a settlement may be fluctuating, and if he has the means of passing one night in one parish and another night in some other parish, then his place of settlement will be where he happened to be at the time of the making of the order of removal. Such is the principle applicable to the settlement by hiring and service, but it is said that only applies where the question arises under the same head of settlement. The principle, however, established in the case of *The King v. Brighthelmston* is, that you are to look to the place where the party was on the last day before the order was made; and applying that principle here, I think the settlement in Cattal was superseded by the subsequent settlement in Coneythorpe.

PATTESON, J. I am of the same opinion. As soon as it is admitted, as it must be, that the forty days' residence need not be in any one year, the appellants are out of court.

COLERIDGE, J. There is no foundation for the distinction taken as to different heads of settlement. In all cases of this kind, residence must be connected with something else which is, so to speak, the meritorious cause of the settlement. I see no good ground of distinction between the present and any other head of settlement, residence bearing the same relation to a settlement by apprenticeship as to the settlement by the purchase of an estate.

WIGHTMAN, J., concurred.

Order of sessions quashed.

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TURNER v. COLLINS.¹

Hilary Term, January 20 and 27, 1851.

Pleading Payment in Satisfaction of a larger Sum — Judgment non obstante Verdicto — Particulars of Demand — Reg. Gen., T. T. 1 Vict.

The declaration in an action of debt claimed 44*l.* 8*s.* The particulars, after giving credit, stated the balance due from the defendant to be 12*l.* 4*s.* The defendant pleaded payment of 15*l.* in satisfaction, and obtained a verdict:—

Held, that the plaintiff was not entitled to judgment *non obstante verdicto*.

Although the court will not judicially notice the particulars of demand, as they are not a part of the record, yet, after verdict, it will take notice that there may be such particulars as will make a plea valid.

THIS was an action of debt, and the declaration contained two counts; the first claimed 22*l.* 4*s.*, for goods sold and delivered; the second, 22*l.* 4*s.*, for money due upon an account stated. The particulars of demand were as follow:—

“This action is brought to recover the sum of 12*l.* 4*s.*, the balance due on the following account:”—

Various items were then set out, amounting to £22 4*s.* 0*d.*

“By bill of exchange, due on the 3d April, 1849, 10 0*s.* 0*d.*

£12 4*s.* 0*d.*

Also to recover 12*l.* 4*s.* upon an account stated between the plaintiff and defendant.”

The defendant had pleaded to the whole declaration, payment of “divers moneys, to wit, 15*l.*, in full satisfaction and discharge of the said debts in the said declaration mentioned, and of the plaintiff’s damages by him sustained on occasion of the detention thereof.” He did not plead any other plea, and at the trial the jury gave a verdict in his favor.

C. G. Addison now moved for a rule calling upon the defendant to show cause why judgment should not be entered for the plaintiff, *non obstante verdicto*. He contended, that payment of a smaller sum in satisfaction of a larger was no answer to the action. Here the defendant had not pleaded the general issue. His proper course would have been to have pleaded that he was never indebted, except as to the sum of 15*l.*, and as to that sum, payment. The particulars of demand could not be looked at.

Several cases were cited, which are sufficiently noticed in the judgment.

Cur. adv. vult.

January 27. ERLE, J., now delivered the following judgment: In this case the plaintiff moved for a rule *nisi* for judgment, *non obstante*

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veredicto, on the ground that the declaration having two counts in debt, each for 22*l.* 4*s.*, and the plea alleging payment of divers moneys, to wit, to the amount of 15*l.*, in full satisfaction of the said debts, a verdict for the defendant on that plea is of no avail, because it is said to find that 15*l.* were paid in satisfaction of 44*l.* 8*s.*, and the rule of law is contended to be, that payment of a smaller sum cannot be a satisfaction of a greater. I assume the rule to be as contended for, although there is no reason why a creditor might not agree to receive money as well as money's worth in satisfaction of a debt without regard to value, and although the rule only operates to enable a creditor to break his promise with impunity. Also, I assume that the amount of debt alleged in each count is taken to be admitted in the plea, and that the sum mentioned in the plea, although laid under a *videlicet*, fixes the amount of payment which is admissible in proof; and although the plea, in my judgment, ought to be construed to mean payment of the debt claimed, whatever that be, notwithstanding this, I am of opinion that the verdict for the defendant on the plea entitles him to judgment.

After the new rules under Will. 4, there was difficulty in declaring for a balance of a debt, and in preventing unnecessary pleading, where a payment was admitted. In *Ernest v. Brown*, 3 Bing. N. C. 674; 1 Jur. 263, and in *Nicholl v. Williams*, 2 M. & W. 758; 1 Jur. 800, owing to this difficulty, the injustice occurred of giving judgment for the plaintiff for a debt upon a reason of form, when in substance payment of that debt had been proved; this was in 1837. In *Down v. Hatcher*, 10 Ad. & El. 121; 3 Jur. 651, the same principle appears to have been reluctantly acted on, the plaintiff undertaking to receive nominal damages only; this case was brought to trial also before Michaelmas term, 1837. In that term the rule of Trinity term, 1 Vict., by which this inconvenience would be remedied, came into operation, and being made under the statute, it has the force of a law; it is thereby declared, in effect, that if a plaintiff gives credit for a payment in his particulars of demand, it shall not be necessary for the defendant to plead such payment. Now, as a plaintiff may declare for a large debt, and by his particulars of demand may give credit for payments, and as these payments need not be pleaded, it follows that a plea of payment of a less sum than the debt in the declaration may, with credits so given, be equal to the debt claimed, and so be a valid plea, notwithstanding the apparent deficiency of amount. I am well aware that upon this motion, as well as upon error, the particulars of demand not being on the record are not before the court, and therefore I cannot take judicial notice of that which I learned on inquiry, viz., that in this case the plaintiff has given credit for a payment in his particulars of demand, and has thereby limited the debt claimed to 12*l.* 4*s.*; in answer to which the payment of 15*l.* would be sufficient. But I am bound to take notice that there may be such particulars of demand as would make the plea valid; and after verdict, where two suppositions are equally consistent with the record, that which will prevent the pleading from becoming null ought to be adopted. In accordance with this view, it is laid down in *Eastwick v. Harman*, 6 M. & W. 13; 9

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Law J. Rep. (N. S.) Exch. 137, that where the plaintiff is going only for a balance after crediting payments in his particulars of demand, the plea of payment is to be taken with reference to that balance; and in *Lamb v. Micklethwait*, 1 Q. B. 400; 10 Law J. Rep. (N. S.) Q. B. 178, the doctrine thus laid down in the Exchequer is adopted by this court. In *Randall v. White*, (MS.) cited from the Exchequer, I observe there were more objections than one to the plea; and if the objection under discussion was sustained without referring to the rule of court, the present point was not made. For these reasons, and on these authorities, this rule is refused.

Rule refused.

LEEMING & another v. SNAITH.¹

January 17, 1851.

Contract — Construction — Words, "Say not less than."

An agreement, dated the 12th of December, between the plaintiff and the defendant, who carried on the business of a puller of wool, stipulated that the defendant should sell to the plaintiff what he might pull up to the 6th of January, "say not less than 100 packs of wool."

Held, (*dissentiente* Coleridge, J.,) that in the absence of an averment that the word "say" had any peculiar meaning, the agreement imported that the defendant should pull and supply to the plaintiff 100 packs as a minimum during the specified period, and that the plaintiff should take any further quantity which should be pulled by the defendant during the period.

ASSUMPSIT. The declaration stated that "combing skin" was a certain description of wool, and that the defendant, at the time of the making of the contract hereinafter mentioned, was a puller, or preparer for sale, and a seller of the said article called combing skin; and that thereupon, to wit, on the 12th of December, 1848, a certain agreement was made by and between the plaintiffs and the defendant, and was in the words, &c., hereinafter set forth, that is to say, "John Snaith, of Boston, sold to John Leeming & Co. what he may pull, up to the 6th of January, say not less than one hundred packs, of combing skin, at 7½*d.* per pound, delivered in Manchester, allowing three months' interest for cash, delivered in clean and dry condition. Boston, December 12, 1848." [Averment of mutual promises.] That, although after the making of the said agreement and promise, a reasonable time for the delivery of the said packs of combing skin had elapsed, before the commencement of this suit, and the plaintiff had always, from the time of the making of the said agreement, been ready and willing to accept, receive, and pay for, at the rate or price and on the terms aforesaid, the said quantity of combing skin, in and by the said agreement mentioned and intended, and according to the said terms, of all which promises the defendant, during all the time aforesaid, had notice, and although the defendant did in fact pull and

¹ 20 Law J. Rep. (N. S.) Q. B. 164.

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deliver to the plaintiffs a certain small quantity of the said combing skin, in the said agreement mentioned, and a much smaller quantity than one hundred packs, to wit, eighty packs of the said combing skin, and no more, yet he never delivered to the plaintiffs any further or greater quantity of the said combing skin, &c.

Demurrer, on the ground that it is not averred in the declaration that the defendant promised to pull and deliver to the plaintiffs the said quantity of one hundred packs of the said combing skin; that no breach, by the defendant, of the agreement is shown therein, inasmuch as the defendant was not bound by the said agreement to pull within the said period in the said agreement specified the entire quantity of one hundred packs, or any certain quantity of the said combing skin, or to deliver to the plaintiffs such entire quantity of one hundred packs, unless that quantity had been pulled by him within or during the said last-mentioned period; and it is nowhere stated in the declaration that during the said last-mentioned period the said entire quantity of one hundred packs, or any greater quantity than eighty packs, was in fact pulled by the defendant, or might, without default, have been pulled by him, &c. Joinder in demurrer.

Whitehurst, in support of the demurrer. Under this contract the defendant was only bound to deliver as much of the wool as he should pull within the specified period. If there were any fraud in the defendant neglecting to pull the wool, that might be ground for another breach; but no such allegation is here made. It is quite manifest that the plaintiff did not stipulate for any wool which might be pulled by any other person than the defendant. This would be clearly the construction, if the word "say" were omitted, but that merely implies an estimate of what may be the probable amount pulled during the period. It does not bind the defendant to pull that quantity, at all events. *Gwillim v. Daniel*, 2 Cr. M. & R. 61; s. c. 4 Law J. Rep. (N. S.) Exch. 174, is precisely similar to this case. There the agreement was to purchase all the naphtha which the defendant might make during two years, "say from one thousand to one thousand two hundred gallons per month;" and it was held, that this did not import that the seller was bound to make that quantity of naphtha during the period, and having ceased to carry on the business during the time, he was not liable for a breach of contract.

[*Patteson*, J. The words "not less" were not inserted there.]

They make no difference, if, according to what is said there, the word "say" amounts only to an understanding of the parties that the produce might be expected to be not less than the quantity specified.

Cowling, contra. The question is, What is the mercantile meaning of the words here found? Though more accurate language might, perhaps, have been used, it is clear that the plaintiff stipulates to have all the wool that the defendant should pull, provided, however, that it should not be less than one hundred packs.

[*Coleridge*, J. The language is absolute as to all that he pulls, but it is left conjectural as to the quantity.]

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If the plaintiff were to have only what the defendant should pull, he might be at his mercy, therefore he protects himself with a guaranty that it shall not be less than one hundred packs. The word "say" may imply a mere estimate or conjecture, but it may also mean "that is to say," and be used to render certain what was before left uncertain. The latter is the more natural meaning of the word, and is that adopted in pleading where a "videlicet" is inserted.

[*Lord Campbell, C. J.* Then you impugn *Gwillim v. Daniel*.]

It is not necessary to do that, for there were no negative words there. If "say" here implies a mere estimate, no meaning is given to the words "not less," which plainly point to a minimum.

[*Coleridge, J.* Must we read every word in an agreement of this kind as a word of contract?]

Effect must be given to these words to protect the plaintiffs against an entire failure of any benefit. If "say not less" are rejected, there would be no breach of contract if the defendant only pulled ten packs.

Whitehurst replied.

LORD CAMPBELL, C. J. In this case, the plaintiff is entitled to judgment. The plaintiff must be taken to have had occasion for one hundred packs of wool, and he stipulates that this quantity shall be delivered to him, and also is willing to take beyond that quantity all that the defendant should pull within the specified period. That appears to be the intention to be gathered from the terms of the contract. He was to have all that was pulled, but to ensure his having a certain quantity, it is provided that not less than one hundred packs should be delivered; that is by way of fixing a minimum. I give no peculiar sense to the word "say," but I agree with Lord Abinger, that if it has any such peculiar sense, it should be averred on the record. Taking the word according to its usual grammatical meaning, it seems to me that the fair interpretation of the contract is as I have stated. If there had been any case directly in point, I should have been reluctant to decide against it, but there is a material difference between the present case and *Gwillim v. Daniel*. There the words "not less" do not occur. Consistently with that case, there may be here an absolute contract to deliver one hundred packs.

PATTESON, J. It seems to me that the words "not less" render this case distinguishable from *Gwillim v. Daniel*. There the word "say" was treated as an estimate or representation of the probable amount, and the court held it necessary to show that it bore some other meaning, or to allege fraud. Here the parties have inserted the words "not less." I have not the least doubt that, if the word "say" had not been here, the defendant would be held to have engaged to deliver not less than one hundred packs. Then the real question is, whether "say" is to do away with that engagement. I cannot see how it can have such an effect. It is merely "that is to say," and it is, therefore, a part of the contract that the defendant was to deliver not less than one hundred packs. The defendant carried on the business of

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a puller of wool, and would, therefore, be reasonably able to guaranty the supply of a fixed quantity in so short a period as a little more than a month, and it was certainly very material for the plaintiffs to know how much they were likely to have.

COLERIDGE, J. I have the misfortune to entertain a different opinion from the rest of the court; but I do not feel so strongly upon the point as to make me very confident of the correctness of my view. But looking, in the first place, at what I collect to have been the probable intention of these parties, I think they meant to stipulate that whatever should be produced within the given period should be sold to the plaintiff, but that the quantity should be expressly left undefined. The only argument against this view is that mentioned by my brother Patteson as arising from the shortness of the time during which the contract was to be in force. But we cannot judge of the effect of that until we know more about the circumstances of the trade. It rather seems to me probable that the parties purposely excluded the mention of any definite quantity, because both were aware of the probable rate of production, and did not contemplate either the death or leaving off business of either, and that they put down not less than one hundred packs as an estimate of that probable rate of production. It is to be observed that there is no maximum fixed as in the other case. Then what is the ordinary meaning of these words? There is no averment that "say" has any particular mercantile meaning, and we must construe it according to common sense. I should say its effect is to leave the quantity indefinite. In *Gwillim v. Daniel*, there was the word "say," and the decision of the court turned, as here, upon its meaning; and they held it to be equivalent to "we estimate that it will not be less than so much." The authority of that case seems quite express. I am unable to see any solid difference between that and the present case, and I am unwilling to draw fine distinctions.

Judgment for plaintiffs.

DAVIS v. CARY.¹

Trinity Term, June 21, 1850.

Debt — Pleading — Stat. 26 Geo. 2, c. 61, 3 Geo. 4, c. 126 — Demurrer.

A local act, 26 Geo. 2, c. 61, required the treasurer of the S. M. turnpike roads to give security, and enacted that he should, from time to time, when and as often as he should be required by the trustees, or any seven or nine of them, produce to them, or seven or nine of them, accounts in writing of all the moneys by him received, &c., and all which, upon a proper balance, should be found due from him, he should pay over to the trustees, or any seven or nine of them, or to such person or persons as they, or any seven or nine of them, should direct or appoint. The General Turnpike Act, 3 Geo. 4, c. 126, s. 77, contained similar provisions as to accounting, except that it provided that the accounting should be to the trustees, or to such person or persons as they should for the purpose appoint. The

¹ 15 Jur. 310.

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act 4 Geo. 4, c. 95, s. 46, repealed sect. 78 of stat. 3 Geo. 4, c. 126, and reenacted nearly similar provisions.

An action was brought against the surety, upon a bond executed by him, dated the 31st December, 1822, the condition of which bond was, that if J. C., the treasurer, under stat. 26 Geo. 2, c. 61, of the S. M. turnpike roads, should duly and faithfully account and pay, according to the direction and true intent and meaning of the said act and of the General Turnpike Act, 3 Geo. 4, c. 126, then the bond to be void. Defendant pleaded the repeal of sect. 77 of stat. 3 Geo. 4, c. 126, by stat. 4 Geo. 4, c. 95, s. 46, and alleged performance by the treasurer up to the time of repeal. Plaintiff replied by assigning breaches, first, that certain persons, trustees, (naming ten of them,) required the treasurer to account to certain persons, (naming them,) these being persons duly appointed by the said trustees for that purpose, and yet, although a reasonable time elapsed, the treasurer did not account, but refused and neglected to do so; and, secondly, that the treasurer received money as treasurer, yet did not truly account for and pay over such money, according to the directions, true intent, and meaning of the local act and stat. 3 Geo. 4, c. 126, and according to the tenor and effect and true intent and meaning of the bond. Rejoinder, as to the first breach, alleged performance by the treasurer up to the repeal of stat. 3 Geo. 4, c. 126, and as to the residue of the moneys received, that they were received after such repeal; and as to the other breach, alleged that no part of the moneys came to the treasurer's hands before the repeal of stat. 3 Geo. 4, c. 126:—

Held, on demurrer, —

First, that the replication was bad; for that the first breach was badly assigned, inasmuch as it stated that the treasurer was required, according to stat. 3 Geo. 4, c. 126, s. 77, to account to persons appointed by the trustees for that purpose, whereas, after the repeal of sect. 77 of stat. 3 Geo. 4, c. 126, the treasurer could not be legally so required; and the second breach was badly assigned, because, although it required no aid from Stat. 3 Geo. 4, c. 126, and therefore the reference to that statute was surplusage, yet it contained no allegation of a requisition by the trustees to pay or account, which was a condition precedent to any forfeiture for non-compliance, within the other statute, on which the breach must rest — namely, the local statute, 26 Geo. 2, c. 61.

Secondly, that the plea was bad, since, by not answering the alleged non-performance of the condition of the bond subsequent to the repeal of stat. 3 Geo. 4, c. 126, it failed to answer the whole declaration.

Thirdly, that the declaration was sufficient, and the action maintainable, and that the bond might be put in force, notwithstanding the repeal of sect. 77 of stat. 3 Geo. 4, c. 126, since, although so much of the performance of the condition as depended upon compliance with sect. 77 of stat. 3 Geo. 4, c. 126, was become impossible, yet there might be a performance of so much of the condition as depended upon the local act, 26 Geo. 2, c. 61.

DEBT on bond in the penal sum of 2000*l.*, dated the 31st of December, 1822. The defendant pleaded, first, *non est factum*; then, setting out the bond upon oyer, by which it appeared that Joseph Cary, treasurer of the Sheptan Mallet turnpike roads, under the 26 Geo. 2, c. 61, and three other several acts, passed in the fifth, twentieth, and thirty-first years of the reign of George III., for extending the former act, and J. B., and S. C., the defendant, were jointly and severally bound to the plaintiff and P. C., in the sum of 2000*l.*, conditioned, that if Joseph Cary, his executors, or administrators, “shall duly and faithfully account for, apply, and pay every the sum and sums of money which hath come or shall come to his hands as treasurer of the turnpike road aforesaid, according to the direction and true intent and meaning of the said acts, and of the statute made in the third year of the reign of his majesty King George IV., for regulating turnpike roads,” then the obligation to be void, or else to remain in force. The defendant pleaded, secondly, that so much of the provisions of the statute passed in the third year of the reign of George IV. as was referred to in the condition of the bond was repealed by the 4 Geo. 4, c. 95, intituled, &c., and that the said

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Joseph Cary did at all times, up to and until the said repeal of the said provisions of the said act, duly and faithfully account for and apply and pay all and every the sums of money which came to his hands, as treasurer of the said turnpike road, according to the direction and true intent and meaning of the said acts in the said bond mentioned, and of the said stat. 3 Geo. 4, c. 126, and according to the tenor, true intent, and meaning of the said condition. Verification. Replication to the second plea, in substance, that before and from the time of the making of the said bond, up to a certain time, and before the commencement of the suit, to wit, from the 2d of December, 1822, until the 5th of June, 1849, the said Joseph Cary continued treasurer as in the bond mentioned; and that whilst Joseph Cary was such treasurer, and before, &c., to wit, &c., divers large sums of money were received by him as such treasurer, yet the said Joseph Cary did not nor would duly and faithfully account for, apply, and pay all such last-mentioned sums of money, according to the direction and true intent and meaning of the said acts, and of the stat. 3 Geo. 4, c. 126, and of the condition of the said bond; but, on the contrary, although, after the making of the said bond, and after the said repeal of the said provisions in the plea mentioned, and whilst the said Joseph Cary remained such treasurer, to wit, &c., the said Joseph Cary was required by certain persons, then being trustees for the repair and management of the Shepton Mallet roads, duly appointed and acting according to the statutes in such case made and provided, to wit, by, &c., (the names of the trustees were set out,) to render and quit to one Arthur Constantine Phipps and one Samuel Gillett, then being persons duly appointed by the said trustees, a full, true, fair, exact, and perfect account, in writing, under the hand of the said Joseph Cary, of all moneys which he had received, paid, disbursed, disposed of, or applied by reason of his said office of treasurer; and although a reasonable time for that purpose had elapsed, and although the said Arthur Constantine Phipps and Samuel Gillett and the said trustees had been at all times ready and willing to receive such account, yet the said Joseph Cary had not rendered such account in writing, but refused so to do, contrary to the condition of the said bond. Verification. And as a further breach of the said condition, it was, in substance, replied, that divers sums of money, to a large amount, had been received by the said Joseph Cary, as such treasurer; yet the said Joseph Cary did not nor would duly account for and pay the same, according to the true intent and meaning of the said acts, and the stat. 3 Geo. 4, c. 126, and according to the tenor and effect, true intent and meaning of the said bond; but, on the contrary, although, at divers days and times after the making of the said bond, and before and after the repeal of the said provisions of the said act in the plea mentioned, divers sums of money, parcel of the said sums of money, to a large amount, remained in his hands; and although during all the time there were trustees for the repairing and managing the Shepton Mallet roads, entitled to receive the same, according to the condition of the said bond, and the statutes in such case made and provided; and although the said trustees were, during

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all the time, ready and willing to receive the same; and although no other persons or person were or was authorized by such trustees to receive the same, and although a reasonable time for the payment of such sums had elapsed, yet the same had never been paid to such trustees, or any or either of them, but still remained due and unpaid, &c. Verification. Rejoinder, as the first breach, that a part of the said sum, or sums of money therein mentioned, to wit, &c., was received by the said Joseph Cary, as such treasurer, before the repeal of the 3 Geo. 4, c. 126, in the said plea mentioned; that the said Joseph Cary did duly and faithfully account for, apply, and pay the said part of the said last-mentioned sums of money, and every part thereof, which so came to his hands as last aforesaid, according to the direction and true intent and meaning of the said acts in the said bond mentioned, and of the stat. 3 Geo. 4, c. 126, and according to the tenor and effect, true intent and meaning of the condition of the said bond; that the residue of the said sums of money in the said breach mentioned was received by the said Joseph Cary, as such treasurer, after the said repeal of the said stat. 3 Geo. 4, c. 126, in the plea mentioned. Verification. And as to the said other breach secondly above assigned to the said plea, that no part of the said sum of money which so remained due and unpaid in the hands of Joseph Cary, as in that breach mentioned, was received by the said Joseph Cary at any time before the repeal of the said act in the said plea mentioned. Concluding to the country. Demurrer to the rejoinders. As to the rejoinder to the breach first assigned, that the repeal of the stat. 3 Geo. 4, c. 126, s. 77, by the stat. 4 Geo. 4, c. 95, s. 46, did not free the defendant from his liability on the bond under the circumstances alleged; and as to the rejoinder to the other breach assigned, that the traverse by the rejoinder was immaterial, by reason that the defendant was not so freed by the repeal of the stat. 3 Geo. 4, c. 126, s. 77. Joinder in demurrer. The case was argued¹ by

Butt, for the plaintiff; and

Montague Smith, for the defendant.

The court took time to consider.

The judgment of the court was now delivered by

PATTESON, J. This was an action on a bond, dated the 31st of December, 1822, executed by the defendant as surety for Joseph Cary, the treasurer of the Shepton Mallet turnpike roads, under a stat. 26 Geo. 2, c. 61, continued by several other acts. The condition of the bond is, "that if the above-bounden Joseph Cary shall duly and faithfully account for, apply, and pay all and every the sum and sums of money which hath come or shall come to his hands, as treasurer of the turnpike roads aforesaid, according to the direction and true intent and meaning of the said acts, and of the statute made in the third year of the reign of his majesty King George IV., for regulating turnpike roads," then the bond to be void.

¹ May 21, 1850, *coram* LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and EALE, JJ

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The plea states that the stat. 3 Geo. 4, c. 126, was repealed by the stat. 4 Geo. 4, c. 95, and alleges performance up to the time of repeal.

The replication assigns several breaches, two of which only are set out in the copy before us. The first breach states that the trustees of the road (naming ten of them) required Joseph Cary to render and give to Arthur Constantine Phipps and Samuel Gillett, *then being persons duly appointed by the said trustees for that purpose*, a full, true, fair, exact, and perfect account, in writing, with proper vouchers, of all moneys, &c., and that, although a reasonable time elapsed, Joseph Cary did not render or give such account, but refused and neglected to do so. The other breach states that Joseph Cary received large sums of money, as treasurer, yet he did not duly and faithfully account for, apply, and pay all and every such last-mentioned sums of money, according to the directions, true intent and meaning of the said acts, and of the stat. 3 Geo. 4, c. 126, and according to the tenor and effect, true intent and meaning of the bond.

The rejoinder to the first breach alleges performance up to the repeal of the stat. 3 Geo. 4, c. 126; and as to the rest of the moneys, avers that they came to the hands of Joseph Cary after the repeal. The rejoinder to the other breach states, that no part of the moneys came to the hands of Joseph Cary before the repeal of the stat. 3 Geo. 4, c. 126.

To these rejoinders the plaintiff demurred generally.

The local act, 26 Geo. 2, c. 61, requires the treasurer to give security, and it enacts that he shall, from time to time, when and as often as he shall be thereunto required by the trustees, or any seven or nine of them, produce, render, and give up to them, the trustees, or any seven or nine of them, full, true, and fair accounts, in writing, of all the moneys which have been by him received, how, to whom, and for what such moneys shall have been paid, disposed of, or applied, together with proper receipts and vouchers for such payments, and shall pay all such moneys, as upon the balance of such accounts shall appear to be in his hands, to the trustees, or any seven or more of them, *or to such person or persons*, and for such uses and purposes, *as they, or any seven or more of them, shall direct and appoint*; and the same section goes on to give power to justices, in case of refusal to account or pay, to commit the party to prison till he shall comply, and to levy the amount by distress warrant.

The General Turnpike Act, 3 Geo. 4, c. 126, s. 77, which is referred to in the condition of the bond, contains similar provisions as to accounting, except that it provides that the officers shall render account to the trustees, *or to such person or persons as they shall for the purpose appoint*. This 77th section was absolutely repealed by the stat. 4 Geo. 4, c. 95, s. 46, and nearly similar provisions reenacted. As it became impossible, on the repeal of the 77th section of the stat. 3 Geo. 4, c. 126, for Joseph Cary to account according to the directions of that statute, the defendant contends that the bond is no longer in force, since Joseph Cary could not perform the condition of it, and that not by any fault of his, but by the act of the legislature; therefore that a new bond ought to have been taken after the passing of the stat. 4 Geo. 4, c. 95.

This argument is right, so far as the enforcing the present bond depends upon the enactments of stat. 3 Geo. 4, c. 126; but if the enactments of stat. 26 Geo. 2, c. 61, (the local act,) are sufficient to enable the plaintiff to enforce the bond, the repeal of stat. 3 Geo. 4, c. 126, is immaterial.

Now, as to the first breach, those enactments are not sufficient, for the local act does not authorize the trustees to require the treasurer to account to persons appointed by them for that purpose, but only to themselves, the trustees. In order to make the not accounting to persons so appointed a breach of the condition of the bond, it is necessary to introduce the enactment of the 77th section of stat. 3 Geo. 4, c. 126, which has been repealed. The first breach, therefore, is bad, Joseph Cary not being, by any act referred to in the condition, bound to account to such persons.

The other breach, however, does not state any requisition to Joseph Cary to account or pay, but simply negatives the accounting for, applying, and paying the moneys received, according to the directions of the said acts and of the stat. 3 Geo. 4, c. 126. This breach, in the terms in which it is couched, requires no aid from the stat. 3 Geo. 4, c. 126, and the allusion to that statute in the breach is mere surplusage. The question, therefore, is, whether it be sufficient under the local act. That act provides that the treasurer shall, when and as often as he shall be required, account and pay over what upon the balance of such account shall appear to be in his hands. The breach alleges that he has received moneys, and that he has not accounted for, applied, or paid over such moneys, according to the directions of the act, but that the moneys remained in his hands after a reasonable time for accounting and paying over had elapsed, and are still unpaid; but it alleges no requisition to account or pay.

Now, it seems to be clear that the bond would not be forfeited, and that Joseph Cary would not have failed in accounting for, applying, and paying over the moneys according to the directions of the act, unless he had been required so to do by the trustees. Their requisition is in the nature of a condition precedent. See *Simpson v. Routh*, 2 B. & Cr. 682. The defendant has no opportunity of denying it, unless it be averred in some form. Assuming, for the sake of the argument, that no requisition, or no sufficient one within the local act, was ever made to Joseph Cary, the defendant could not raise that defence by traversing any of the allegations in the breach; and it would be contrary to all the course of pleading to require him to allege the non-performance of a condition precedent on the part of the plaintiff or the trustees. The breach does not even allege that Joseph Cary appropriated or converted the moneys to his own use; it merely states that they remain in his hands, and are still unpaid; and so they may, consistently with the condition of the bond, unless he has been duly required to account and pay over. We think that the want of an averment to that effect is a fatal objection to this breach, and that both breaches are bad.

But we are reminded that the plea admits the non-performance of the condition of the bond subsequent to the repeal of the stat. 3

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Geo. 4, c. 126, s. 77, and cannot therefore be supported, unless by that repeal the condition of the bond became impossible, and so the bond itself could not be enforced. We have already expressed our opinion that the repeal of that statute had not that effect, but that the bond continued in force, and breaches of it might be assigned under the provisions of the local act. It follows that the plea does not answer the whole of the declaration, but a part only, and is bad on general demurrer. Our judgment must therefore be for the plaintiff, for want of a sufficient plea.

Judgment for plaintiff, with leave to defendant to amend on payment of costs within a fortnight.

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Trinity Vacation, June 25, 1850.

Debt for Penalty — Stat. 5 & 6 Will. 4, c. 76, s. 53 — Councillor.

The defendant, in an action for penalties under the stat. 5 & 6 Will. 4, c. 76, s. 53, for acting as a councillor of a borough after he had ceased to be qualified, had been an inhabitant householder in the borough during the whole time required by the act. He had also, during the whole time, been rated for certain premises by name, by the name of a public house, but which premises consisted of the house, with a warehouse and yard attached. In the middle of the required time the defendant let the public house, and removed to another dwelling, but retained the warehouse in his own occupation. The defendant gave notice to the parish officers of his change of residence, and required to be newly rated, but no change was made, in time, in the entry in the rate book. The defendant had paid all the rates which were due. At the Registration Court, before the mayor and assessors, in October, 1848, after the change of residence of the defendant, there was an objection taken to his name upon the burgess list, for that his qualifying property was wrongly described; and the objection was allowed, and his name struck off the burgess roll. Afterwards the defendant acted as a councillor:—

Held, that nevertheless the defendant was not liable to a penalty, since he was, at the time he acted as councillor, a person so qualified, within the borough, as to be entitled to be upon a burgess list; and in an action for penalties under the statute, the question is not whether, at the time he acted, defendant was or was not a burgess, or was or was not inserted in the burgess roll or in a burgess list, but whether, at the time he acted, he was or was not a person so qualified, within the borough, as to be entitled to be upon a burgess list of it.

This was an action of debt for penalties founded upon the stat. 5 & 6 Will. 4, c. 76, s. 53, for acting as a town councillor of the borough of Stockport, on the 14th of February, 1849, without being duly qualified. Plea, *nil debet*. At the trial, *coram* Maule, J., at the Summer assizes at Chester in 1849, it appeared that the defendant had been elected a councillor in November, 1848, and had acted as such up to and in February, 1849. In the rate book of 1848-9 the defendant was registered as rated for the occupation of "a house, Middle Hillgate," called "The Jolly Hatters" public house. It appeared that the premises at the Jolly Hatters consisted of the public house itself, with a warehouse and yard attached. Up to the 14th

of August, 1848, the defendant was the occupier of the whole of the premises, but on that day he let the house, retaining in his own occupation only the warehouse. On and after the 14th of August, 1848, the defendant, besides being the occupier of the warehouse in Middle Hillgate, was the occupier of a house in Cross Street, in the borough. On the 14th of September, 1848, he gave notice to the parish officers of his having let the house in Middle Hillgate, and demanded to be rated for the house in Cross Street. Before the defendant's change of residence, two rates had been made for the year 1848, of which, before the 13th of August, the defendant had paid the whole of one, and a portion of the other, as for the premises in Middle Hillgate. On the 21st of September, 1848, he paid the second portion of the second rate, partly in respect of the house in Cross Street, and partly for the warehouse in Middle Hillgate, and his name was put in the margin of the rate book as the person whose name ought to have been regularly inserted in the rate for the house in Cross Street. His name was not regularly so inserted until March, 1849. Upon the revision of the burgess list for Middle Hillgate for the year 1848-9, it was objected that the defendant's property was wrongly described in it, since he was no longer, at that time, the occupier of the house called "The Jolly Hatters," in Middle Hillgate. His name was struck out by the mayor and assessor. Upon these facts appearing, a verdict was, by the direction of the learned judge, entered for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him. In the following term a rule *nisi* was accordingly obtained for that purpose; against which

J. Evans and *Crompton* now showed cause. The action is brought upon the 53d section of the stat. 5 & 6 Will. 4, c. 75, which imposes a penalty of 50*l.* upon any who shall act as mayor, councillor, &c., after he shall have ceased to be qualified according to the provisions of the act. The qualification of a councillor is in sect. 28, which enacts that none shall be qualified to be a councillor who shall not be entitled to be on the burgess list. The question, therefore, is, whether, at the time laid in the indictment, i. e., in February, 1849, the defendant was entitled to be on the burgess list. That must be determined by reference to the 15th and 18th sections, by the first of which it is enacted, that on the 5th of September in every year the overseers of every parish shall make out a list, to be called the burgess list, of all persons entitled to be enrolled on the burgess roll of that year; and by the second it is enacted, that the mayor and two assessors shall every year, in the month of October, in open court, determine which of such persons are entitled to remain on such list, and which ought to be removed, &c., and that the corrected burgess lists are to be called the burgess roll. It follows that the persons entitled in February, 1849, to be on the burgess list were those, and those only, who the mayor and assessors determined ought to be there in October, 1848. But the defendant was not one of those persons. It was shown at the trial that his case, among others, had been brought in October, 1848, before the mayor and assessors, and that, by their judgment, his name was

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declared to be not entitled to be upon the burgess list. The defendant never appealed against that decision; it stands, therefore, as the uncontradicted decision of the competent court, that is, as a decision binding upon all other tribunals, that the defendant was not entitled in October, 1848, to have his name upon the burgess list. The defendant was not, therefore, in February, 1849, duly enrolled as a burgess of Stockport, and was, therefore, not entitled to act as a councillor. It is not the case of *Reg. v. Dixon*, 14 Jur. 811, in which the decision of the mayor and assessors had never been asked, since the name of the party had been omitted by mistake from all the lists; for, in the present case, the name of the defendant was before the competent court, his case was heard, and the decision was against him. But, supposing the decision of the Mayor's Court can be called in question before this court, it was correct; the name of the defendant was properly struck off the burgess list. He was not, on the last day of August, 1848, as he was said to be on the burgess list, the occupier of a house in Middle Hillgate, called "The Jolly Hatters." He had ceased to be so on the 14th of August. It is true, he remained occupier of the warehouse, but he was not so described either in the rate book or on the burgess list. There was no qualification of the defendant which the mayor and assessors could have properly inserted in the burgess list. The defendant did not appear in the rate book, as rated, before the last day of August, 1848, either for the warehouse in Middle Hillgate, or for the house in Cross Street, but only for the house in Middle Hillgate, which it was proved he had ceased to occupy.

Welsby, contra. If the argument on the other side be correct, the only question in such cases as the present is, whether the name of the defendant appears upon the burgess roll; but that is inconsistent with the case of *Reg. v. Dixon*. The fallacy of the argument consists principally in the interpretation put upon the 28th section. The words, "who shall not be entitled to be on the burgess list," are read as if they were, who shall not be on the burgess roll. But the burgess list and the burgess roll are different registers. The true meaning of sect. 28 is, that any person shall be qualified to be a councillor during any time in which he is possessed and in occupation of such property in the borough as would, at the moment, entitle him to be put upon the burgess list, if it were then to be made out. Now, in February, 1849, the defendant would clearly have been entitled to have his name put upon a burgess list, if one had then been made out. He had been the occupier of a warehouse in the borough during the previous year and two preceding years, and had been, during all the time, an inhabitant of the borough, either in Middle Hillgate or in Cross Street, and had paid the year's rates upon the warehouse.

He was then stopped by the court.¹

¹ LORD DENMAN, C. J., was absent on account of ill health. PATTESON, J., had left the court during the argument.

COLERIDGE, J. I think this rule ought to be made absolute. The action is founded upon the stat. 5 & 6 Will. 4, c. 76, s. 53. The ground of action laid is, that the defendant acted as a councillor of the borough of Stockport, after he had ceased to be qualified; and the fact relied upon to prove that he had ceased to be qualified was the fact that he was no longer entitled to be on the burgess list. That test depends upon sect. 28, according to which the question in the present case certainly is, whether, at the time when the defendant acted as councillor, he was entitled to be on the burgess list. Now, in order to determine that, reference must be had to sect. 15, which makes it the duty of the overseers in every year to make out a list, to be called the burgess list, of all persons who shall be entitled to be on the burgess roll for that year; and from sect. 15, therefore, we are driven to sect. 9, not to see whether, according to that section, the defendant was or was not a burgess, but whether he was or was not entitled to be enrolled a burgess. Whether he was or was not a burgess might, and may, upon the true construction of sect. 9, depend upon whether he was or was not enrolled; but here the question is, not whether he was or was not a burgess, but whether he was or was not such a person as was entitled to have his name inserted in a burgess list. Now, the facts shown in the case pertinent to that question were, that during the year 1848, and up to February, 1849, and during the two preceding years, the defendant had been an inhabitant householder in the borough, and during that time he had been rated, and had appeared in the rate book as rated, for the premises called "The Jolly Hatters." For a time he had paid the rate for the whole of those premises, but afterwards only for a part. That was from a time when he had ceased to be the occupier of the whole. But during the whole time he was occupier of the warehouse, which was a part, and during the whole time he paid the rates on that. It seems to me, therefore, that the defendant was, in February, 1849, a person entitled to be upon the burgess list. But then, as against our so deciding, it has been argued that the court was at the trial, and is now, precluded from inquiring whether the defendant was or was not entitled to be on the burgess list, because it is said that the competent court, namely, the Court of Revision, has decided he was not entitled. If the question had been whether the defendant, in February, 1849, was or was not a burgess, it may be that, by the true construction of sect. 9, the court would have been precluded from looking farther than to see whether the defendant was or was not enrolled as a burgess by the mayor and assessors; but that question does not seem to me to arise in the present action, which depends only upon the question whether the defendant was or was not entitled to be upon a burgess list.

ERLE, J. The question is, whether the defendant acted as a councillor after he had ceased to be qualified; and that question depends upon another, whether, when the defendant acted, he was entitled to be upon a burgess list. The plaintiff, before he can fix the defendant with a penalty, must show that, when he acted, he was not entitled

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to be upon a burgess list. The case has been argued, indeed, for the plaintiff, as if the question were whether the defendant was or was not a burgess, so as to confine the court to look only at the burgess roll; but it seems to me that such was not the intention of the legislature, and that the real question is, only, whether the defendant was or was not entitled to be upon a burgess list. Now that depends upon the circumstance, whether the defendant was a person fulfilling all the description of sect. 9. If he was, then he was a person entitled to be upon a burgess list. The intention of the legislature was, that in all actions for penalties under the act, the question to be tried should be, not, whether the defendant was or was not actually enrolled, but whether he was or was not so qualified as entitled him to be enrolled. Now, in the present case, it was proved that, during all the time required by the act, the defendant had been an inhabitant and householder in the borough; it was proved also that he had been all the time an occupier of such premises as are described in the act, and rated for those premises. The only flaw suggested is, that whereas he was, during all the time, rated for all the premises known as "The Jolly Hatters," he was not, during all the time, the occupier of the whole. The substance of the objection is, that the defendant ceased to be a qualified person, because he ceased to occupy all the premises for which he was rated, though he always occupied sufficient of them to give him a qualification, if rated for that part. The whole of the plaintiff's argument rests upon the proposition, that to cease to occupy a part of the premises for which one is rated is to change the occupation of the whole. I doubt whether the defendant did not keep, within the meaning of the statute, a continuous occupation of the warehouse in Middle Hillgate, for which he was rated. But, assuming that he changed his occupation, he, at all events, from the time of that change, occupied the warehouse, for which he was rated, and brought himself within the proviso, which says, that the premises, in respect of the occupation of which any person shall have been rated, need not be the same premises, but may be different. As to the other point, that the court is concluded, it would have been, if the question before it had been one upon which a court of exclusive jurisdiction had decided *in rem*. But that is not so; the question is not whether the defendant was or was not a burgess; it is not whether he was or was not duly enrolled; it is not whether he was or was not upon a burgess list; but it is, whether he was or was not such a person as was entitled to be upon a burgess list. It was not the intention of the legislature that such a case should be determined by inspection either of the burgess roll or burgess list. That which occurred by accident in *Reg. v. Dixon*, it is not too much to say, might by possibility be done on purpose in another case. In such a case could an action for these penalties be tried, as is suggested? It seems to me a more just construction of the act to say, that, in the action for penalties, it is not the question whether the party is or is not upon the list or roll, but the question is, whether he were such person as was entitled to be there. Upon that view it is clear that the rule must be made absolute.

Rule absolute.

Smith v. Braine.

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Hilary Term, January 18, 1851.

Bill of Exchange — Indorsement — Proof of Consideration.

Where the immediate indorser of a bill of exchange to the plaintiff has parted with the bill in violation of good faith, want of consideration as between him and the plaintiff is presumed, so as to throw upon the plaintiff the *onus* of proving consideration.

Assumpsit on a bill of exchange by indorsee against acceptor. Plea, that the bill was drawn for the accommodation of defendant, and in order that he might get the same discounted, and raise money upon it; that it was indorsed by the drawer in blank, and delivered to defendant for that purpose, who, before the bill became due, delivered it to W. M., for the special purpose of getting the same discounted for defendant; that W. M. delivered the bill to W. C. for the purpose aforesaid, but that W. C., in violation of that purpose, and against good faith, and without the authority or knowledge of defendant or of W. M., and without consideration or value, indorsed the bill to plaintiff:—

Held, that defendant, having proved that the bill was indorsed by W. C. to plaintiff, in violation of the purpose for which he received it, and against good faith, and without the authority of W. M. or of defendant, was entitled to a verdict on that plea, unless plaintiff proved that he had given consideration for the bill.

[*Heath v. Sansom*, 2 B. & Ad. 291; and *Brown v. Philpot*, 2 M. & R. 285, disapproved.—Ed.]

ASSUMPSIT. The declaration stated that E. A. Braine made a bill of exchange for 50*l.*, payable to her order three months after date; that the defendant accepted the bill, and E. A. Braine indorsed the same to W. W. Chandler, who indorsed it to the plaintiff. Breach, non-payment. Seventh plea, that the said bill was drawn by the said E. A. Braine for the accommodation of the defendant, and in order and for the purpose that he might get the same discounted, and raise and procure money thereon; and the same was indorsed by the said E. A. Braine in blank, and delivered to the defendant for his accommodation, and for the purpose aforesaid; that before the said bill became due, to wit, on, &c., he, the defendant, delivered the said bill, so indorsed by the said E. A. Braine, to one W. Morton, whose Christian name is to the defendant unknown; and the said W. Morton then first received the said bill from the defendant, and thence, until he negotiated and delivered the same as hereafter mentioned, held the same on certain terms, and for a special purpose only, to wit, that he might get the same discounted for the defendant, and pay over the proceeds of such discounting to the defendant, or else return the said bill to the defendant; that the said W. Morton did not at any time get the said bill discounted for the defendant, or pay over to him any proceeds thereof, or return the same to the defendant. [And the defendant alleges that the said W. Morton delivered the said bill to the said W. W. Chandler for the purpose aforesaid, to wit, for the purpose of him, the said W. W. Chandler, discounting the same; but the said W. W. Chandler, in violation of the said purpose, and against good faith, and without the authority or knowledge of the defendant or of the said W. Morton, and without any consideration or value whatever for the said indorsement, afterwards indorsed the

¹ 15 Jur. 287.

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said bill ^{1]} to the plaintiff; and, save as aforesaid, there never was at any time any value or consideration for his, the defendant's, said acceptance of the said bill. And the defendant further saith, that there never was any value or consideration for the said indorsement to the said W. W. Chandler, or for the indorsement to the plaintiff, and that they respectively always held the said bill without any value or consideration. Verification. Replication, *de injuria*. On the trial, before Wightman, J., at the Middlesex sittings in Trinity term, the plaintiff proved the handwriting of the defendant and of the indorsees. The defendant called W. Morton, who deposed that the defendant gave him the bill for the purpose of raising money upon it; that Chandler had stated to him that if he would get a 50*l.* bill, he would get it discounted; and that accordingly he gave it to Chandler to get discounted, but that Chandler never handed the proceeds or the bill back to him. E. A. Braine was also called, who deposed that she drew the bill for her son, and did not receive value for it, and that her son got no money for the bill. It was objected for the plaintiff, that there was no evidence to support the allegation in the plea, that the bill was indorsed to the plaintiff without consideration, and therefore that the plea was not proved. The learned judge was of opinion that so much discredit was thrown on the bill as to call upon the plaintiff to prove consideration; and after the plaintiff had given evidence in reply, he left to the jury the question whether the plaintiff had given consideration for the bill. The jury found that the bill was given against good faith, and without authority from the plaintiff, and without consideration; and thereupon a verdict was entered for the defendant on the seventh plea, leave being reserved to move to enter a verdict for the plaintiff on the seventh plea, if the court should be of opinion that the defendant was bound to prove that Chandler had not received value or consideration from the plaintiff. In the same term, May 27, —

Knowles moved for a rule *nisi* accordingly, or for a new trial on the ground of the verdict being against the evidence. He cited *Jacob v. Hungate*, 1 Moo. & R. 445, and *Brown v. Philpot*, 2 Moo. & R. 285.

The court granted a rule *nisi* on the first ground only.

In Hilary term,² *Pigott* showed cause. There was evidence to go to the jury in support of the seventh plea. The bill was tainted by legal fraud, and therefore the title of the plaintiff to it ought to have been cleared up, by showing that he gave consideration for it; and that practice has continued since *Heath v. Sansom*, 2 B. & Ad. 291.

[*Patteson*, J. The prior indorsee may have handed over the bill for a debt due from him; the mere handing over a bill in fraud of the

¹ The plea was amended during the trial by the insertion of the words between brackets.

² January 13 and 14, before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and WIGHTMAN, JJ.

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purpose for which the party received it does not necessarily raise a presumption of want of consideration against the subsequent indorsee, though it may be different where the party got the bill into his hands by deception.]

In *Heath v. Sansom*, Parke, B., though he doubted (p. 297) whether the rule stated by the other judges could be applied "to all cases where an acceptance or note has been given without consideration," said that proof of circumstances "tending to throw suspicion on the indorsement lies on the party disputing its validity, before the indorsee can be called upon to prove that he gave value for the bill." In *Whittaker v. Edmunds*, 1 Moo. & R. 366; s. c., in Banc, 1 Ad. & El. 638, no circumstances of fraud appeared, but Patteson, J. said, 1 Moo. & R. 367, "If, indeed, the defendant can show that there has been something of fraud in the previous steps of the transfer of the instrument, that throws upon the plaintiff the necessity of showing under what circumstances he became possessed of it." In *Jacob v. Hungate*, 1 Moo. & R. 445, the plea alleged failure of consideration, but not fraud.

[*Lord Campbell*, C. J. Do you go so far as to say, that it is sufficient to show illegality in any prior stage of the negotiation of the bill?]

Chandler defrauded the owner of the bill, and there is a presumption that the party who received it from him was implicated in the fraud. He also cited *Millis v. Barber*, 1 M. & W. 425, 432; *Bailey v. Bidwell*, 13 M. & W. 73; and *Bingham v. Stanley*, 2 Q. B. 117; 6 Jur. 389.

Knowles, contra. The allegation in the plea of want of consideration was not proved. In all the cases in which the plaintiff has been called upon to show consideration, the bill was tainted with illegality or fraud in its inception. In *Bailey v. Bidwell*, 13 M. & W. 73, the bill was obtained by fraud, and illegality appeared on the face of it; here, as far as regards the first indorsee, there was no illegality. The argument on the other side makes no distinction between want of consideration and fraud.

[*Wightman*, J. Suppose there had been direct evidence that Chandler never intended to give value for the bill, would he not have obtained the bill on false pretences?]

Heath v. Sansom, 2 B. & Ad. 291, was before the new rules, and has been repeatedly questioned. [He also cited *Millis v. Barber*, 1 M. & W. 425. Tyr. & G. 835. *Jacob v. Hungate*, 1 Moo. & R. 445. *Brown v. Philpot*, 2 Moo. & R. 285. See *Percival v. Frampton*, 2 C. M. & R. 180. *Musgrave v. Drake*, 5 Q. B. 185; 7 Jur. 1015.]

Cur. adv. vult.

LORD CAMPBELL, C. J., now delivered the judgment of the court. The question in this case is, whether, under the seventh plea as amended, when the defendant had closed his evidence, my brother Wightman ought to have directed a verdict for the plaintiff, or to have called upon the plaintiff to give evidence of consideration in reply, intimating that in default of such evidence he would leave the

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evidence given by the defendant to the jury, as being sufficient to justify them in finding for the defendant, if upon that evidence they should believe that all the allegations of the plea were true.

We are of opinion that the latter course was properly taken, and that the verdict for the defendant on the seventh plea ought not to be disturbed. There certainly was no direct evidence to prove that Chandler indorsed the bill to the plaintiff without consideration; but this was one of several facts in a sequence going to impeach the plaintiff's title to sue upon the bill, and this was so likely to follow from the facts which were in evidence, that its existence may be fairly presumed, in the absence of evidence to the contrary, Mr. Knowles, in his able argument, did not contend, that under such a plea the defendant is always bound to give direct evidence of want of consideration, but freely admitted that where it is proved that the person who indorsed the bill to the plaintiff got possession of it fraudulently, the *onus* of proving consideration is cast upon the plaintiff. This doctrine must be considered as now fully established.

The decisions upon the subject before the new rules are rather loose. Sometimes it was held, that, under the general issue of *non assumpsit*, the defendant, by merely showing that the bill sued upon was, in its inception, an accommodation bill, might compel the plaintiff to give evidence of consideration. Some judges ruled that to entitle the defendant to call for this evidence, he must have served a notice upon the plaintiff that it would be required, and other judges ruled that the notice was unnecessary. The matter was treated as a point of practice which might be varied according to supposed convenience.

Under the new rules such a defence must be specially pleaded, and the defendant must adduce evidence from which the jury may legitimately infer the truth of all the allegations of the plea put in issue. But since the new rules, judges have, with entire approbation, directed juries, that where the bill was illegal in its inception, or where the immediate indorser to the plaintiff obtained possession of it by fraud, the want of consideration as between him and the plaintiff may be presumed. I need only refer to the recent case of *Bailey v. Bidwell*, 13 M. & W. 73, in which the Court of Exchequer held, that if to an action on a bill of exchange or promissory note the defendant pleads that it was illegal in its inception, and that the plaintiff took it without value, the illegality being proved, the *onus* is cast upon the plaintiff of proving that he gave value. Parke, B., there says, p. 76, "It certainly has been, since the later cases, the universal understanding, that if the note were proved to have been obtained by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it, and that such proof casts upon the plaintiff the burden of showing that he was a *bona fide* indorsee for value. That has been considered in later times as settled, and that being so, it was perfectly right in this case to cast upon the plaintiff the burden of proving that he gave value for the note." Alderson, B., adds, p. 77, "It appears

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to me, that though the defendant is bound to aver in his plea both the illegality and want of consideration, yet if he proves the illegality, and the plaintiff does not prove the giving of the consideration, the plea is maintained."

But Mr. Knowles insists, that in the present case, before the transfer of the bill to the plaintiff, there was nothing to taint it. He is quite right in saying that mere want of consideration does not constitute fraud; but he is mistaken in supposing, that in this case nothing more is alleged or proved beyond want of consideration. The plea alleges that Chandler, "in violation of the purpose for which the bill was delivered to him, and *against good faith* and without the authority or knowledge of the defendant, or of Morton, indorsed the bill, without any consideration or value, to the plaintiff;" and the evidence of Morton, with respect to Chandler's conduct in this transaction, was such as might reasonably have led to the inference, that when he obtained the bill, although he promised to discount it, and pay the proceeds, for the benefit of the defendant, he meant from the beginning to misappropriate it to his own use. His declarations, which are relied upon to show his good faith, when contrasted with his acts, might be considered only false pretences, by which he obtained, and was allowed to continue in possession of the bill. At all events, before he indorsed the bill to the plaintiff, he may be considered a *mala fide* holder of it; and the same presumption arises, that he disposed of it to the plaintiff without consideration, whether or not he induced Morton, by a fraud, to deliver it into his possession. The jury would not have been bound to draw these inferences; but we are of opinion that there was evidence from which such inferences might have been drawn, and that, if no evidence had been offered in reply, the judge ought to have submitted that evidence to the jury in support of the plea, instead of directing them to find a verdict for the plaintiff.

Mr. Knowles mainly relied upon the two cases of *Jacob v. Hungate*, 1 Moo. & R. 445, and *Brown v. Philpot*, 2 Moo. & R. 285, which it will, therefore, be proper to examine. The former of these does not seem to be at all at variance with the principle we adopt, and was decided by the same learned judge who subsequently so clearly enunciated and explained that principle. In *Jacob v. Hungate*, the question was whether, at the trial, the plaintiff or the defendant was bound to begin. This was to be decided by looking at the record, of course without any regard to evidence. To an action by the indorsee against the acceptor of a bill of exchange, the defendant merely pleaded that he had accepted it without value for the purpose of its being discounted, and the proceeds paid over to him; and that the bill was indorsed to one Mary Hughes without consideration, who indorsed it to the plaintiff without consideration. My brother Parke very properly held that the defendant was bound to begin, giving as a reason, that there was no allegation of fraud; and I may observe, that if there had been such an allegation, still the defendant must have begun, for it is only on *proof* of fraud or illegality that the presumption arises of an indorsement without consideration to the

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plaintiff. The other case *Mr. Knowles* was fully justified in saying is an authority expressly in his favor. To a similar action there was a plea that the bill had been accepted by the defendant without consideration, and had been fraudulently indorsed without consideration to a person who indorsed it to the plaintiff without consideration; and Lord Denman is reported to have ruled, that after the defendant had proved that the bill was accepted by him without consideration, and that it had been fraudulently indorsed without consideration to the person who indorsed it to the plaintiff, the defendant was further bound to prove, in support of the plea, by express evidence, that the bill had been indorsed to the plaintiff without consideration. But with the most sincere respect for the judge who is said to have so ruled, I must observe, that it was, at most, a *nisi prius* decision, and that the point does not seem to have been pressed, or much argued, the defendant's counsel having contented himself with stating what he could and what he could not prove, and no authority being cited except *Heath v. Hansom*, 2 B. & Ad. 291, which had been before considerably shaken. The case of *Bailey v. Bidwell*, 13 M. & W. 73, in which a contrary rule is laid down, was solemnly decided by the Court of Exchequer in Banc four years after, and has been frequently acted upon since. We are, therefore, of opinion that *Brown v. Philpot* cannot now be considered an authority by which we ought to be governed, and that in this case the defendant is entitled to retain the verdict which has been found for him.

*Rule discharged.*¹

¹ See also *Munroe v. Cooper*, 5 Pickering, 412, (1827.) *Small v. Smith*, 1 Denio, 383, (1845.) 2 Greenl. Ev. sec. 172. Any fraud or illegality in the making of a bill or note, or in its indorsement and transfer, imposes upon the holder the burden of proving that he came by the paper *bona fide*, without notice of the said defects, and for a valuable consideration. Mere *bona fides* is not sufficient. *White v. Springfield Bank*, 1 Barbour, 226, (1847.) *Vallett v. Parker*, 6 Wendell, 615, (1831.) *Boyd v. McIvor*, 11 Alabama, 822, (1847.) It is otherwise, however, if the only objection to the paper is *want of consideration*

between the original parties, without notice to the plaintiff. *Middletown Bank v. Jerome*, 18 Connecticut, 443, (1847.) *Thompson v. Shepherd*, 12 Metcalf, 311, (1847.) *Knight v. Pugh*, 4 Watts & Sergeant, 445, (1842.) *Hascall v. Whitmore*, 19 Maine, 102, (1841.) *Bush v. Peckard*, 3 Harrington, 385, (1841.) But if a negotiable note be merely assigned, but not indorsed, the maker may then show want of consideration in an action by the assignee in the assignor's name, even although the assignee had no notice of such defect. *Calder v. Billington*, 15 Maine, 319, (1839.)

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REGINA v. THE INHABITANTS OF ST. MARYLEBONE; in re MARY ANN LAWRENCE.¹

Hilary Term, January 22, 1851.

Pauper — Settlement — Interruption — Removal by parish Officers.

Where a pauper left a parish, in which she had resided for five years, with the assistance given to her by the overseer of the parish, contrary to sect. 6 of Stat. 9 & 10 Vict. c. 66, and she afterwards returned to that parish, her absence does not operate to cause an interruption in the residence, within sect. 1.

The Quarter Sessions must find the intent with which parish officers give assistance for the conveyance of a poor person out of their parish; and this court will not infer an intent contrary to law from the facts stated. But this court, in a particular case, stated their opinion, that the Quarter Sessions would be justified by the facts in finding the intent to have been to make the pauper chargeable to the respondent parish, within sect. 6 of stat. 9 & 10, Vict. c. 66.

Semble, the irremovability of a widow from the parish, in which she was residing with her husband at the time of his death, for twelve months next after his death, created by sect. 2 of stat. 9 & 10 Vict. c. 66, is destroyed by an interruption in the residence during the twelve months.

ON appeal, at the April Quarter Sessions for the county of Middlesex, against an order of two justices for the removal of Mary Ann Lawrence and her three children from the parish of St. Marylebone, in the said county, to the parish of Brighthelmston, in the county of Sussex, the sessions quashed the order, subject to the opinion of this court on the following case: For upwards of eight years next before the month of May, 1847, the late husband of the pauper, Mary Ann Lawrence, resided with his said wife and their children, as they were born, in the respondent parish of St. Marylebone, without receiving parochial relief. While the pauper, Mary Ann Lawrence, and her husband, so resided in St. Marylebone, the mother of the said Mary Ann Lawrence lived in Brighton, in the county of Sussex, and the said Mary Ann Lawrence on four occasions paid a temporary visit to her mother at Brighton, taking with her, at times, her children, during the course of the said eight years. The husband of the said Mary Ann Lawrence had work and employment in London in or near to the said parish of St. Marylebone during the greater part of the said eight years of his continued residence with his wife in St. Marylebone. In the month of May, 1847, the husband of the said Mary Ann Lawrence obtained work at Reigate, in Surrey, distant twenty-five miles from the said parish of St. Marylebone; and his said wife, with their children, about the 15th of October, 1847, paid a visit to her mother at Brighton, retaining, however, the lodgings which she occupied in the respondent parish, and leaving their furniture in such lodgings. The said husband of the said Mary Ann Lawrence had been regularly in the habit of sending her 10s. a week during the period of such his work and employment at Reigate, and had on two occasions during the said time come home and spent from Saturday evening to Monday morning with his said wife and children; and from the time

¹ 15 Jur. 289.

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of the said pauper's husband going to Reigate as aforesaid, up to the day of his decease, he hired a bed in a double-bedded room in Reigate. On the Friday after she had so gone to Brighton, she received information of the death of her husband, which occurred at Reigate on the 20th of October, 1847. On the following day she wrote to her landlady, stating that she gave up the room which she rented in the respondent parish, which notice her landlady accepted. On the 23d of October, she went to Reigate to attend her husband's funeral, and staid there till the Monday following, and then proceeded to her brother's house in the respondent parish. On the morning after her arrival in St. Marylebone from Reigate, she went to the workhouse there, and applied for relief from the parish officers, which relief she then obtained. She remained in St. Marylebone, and received relief on a few other occasions, when ultimately one of the officers told her, on her applying for relief, that Brighton was her parish, and that he would give her 10s. to pay her fare to Brighton; and she waited in the workhouse whilst the horse and cart used for the conveyance of paupers was got ready, and she and her children were taken in the cart to the station of the London and Brighton Railway, no one going with them except the driver and the young man who was sent by the officer of the respondent parish to see her off. When at the station, the young man said he had received from the St. Marylebone officer 10s. to pay her fare, which he gave her there for that purpose. The pauper accordingly went to Brighton about the 2d or 3d of November, 1847, and proceeded to the residence of her mother, and slept there that night, and on the morning after her arrival at Brighton she applied to the overseers of the appellant parish for relief, and was received into the workhouse of that parish, where she remained for three weeks, and then obtained her discharge from the workhouse and went to the house of her mother in the appellant parish, and remained there for two or three weeks, during which time she received no parochial assistance whatever. After this she again applied to the appellant parish for relief, and was allowed 3s. per week and some bread and flour. This relief was given for three months, during the whole of which time the pauper resided with her mother in the appellant parish. After this she left Brighton, and came to the respondent parish, and, becoming chargeable to that parish, an order of removal was applied for and made on the 4th of August, 1848. The Court of Quarter Sessions found that the pauper, Mary Ann Lawrence, had proceeded to Brighton with an intention of paying a visit to her mother there, and of going back to her home in St. Marylebone when the visit was ended; and they further found that there was in her an *animus revertendi* to St. Marylebone from the time she heard of her husband's death. If the Court of Queen's Bench should be of opinion that the said Mary Ann Lawrence had not resided in the said parish of St. Marylebone for five years next before the application for the said order of removal, and also that the said Mary Ann Lawrence was not residing in the said parish of St. Marylebone with her husband at the time of his death, so as to be irremovable therefrom, as a widow, for a twelvemonth

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thereafter, within the meaning of sect. 2 of stat. 9 & 10 Vict. c. 66, then the order of sessions to be quashed. But if the court should be of opinion that the pauper was irremovable on either of the above grounds, then the order of sessions is to be affirmed on the ground of such irremovability. The case was argued by

Pashley, in support of the order of sessions. First, the pauper was irremovable by reason of five years' residence in the respondent parish, within sect. 1 of stat. 9 & 10 Vict. c. 66. The period of her residence at Brighton must be excluded, because it was caused by the wrongful act of the overseers of the respondent parish.

[*Lord Campbell*, C. J. Irremovability is for the benefit of the pauper. If a pauper is willing to return to the place of his settlement, the parish officers do no wrong in assisting him to do so; it is always in the power of a pauper to go to the place of his last legal settlement. But if the parish officers act fraudulently, or threaten the pauper that if he does not go they will obtain an order of removal, that raises a different question.]

Sect. 6 of stat. 9 & 10 Vict. c. 66, imposes a penalty on parish officers who, "contrary to law, with intent to cause any poor person to become chargeable to any parish to which such person was not then chargeable, convey any poor person out of the parish, or cause or procure any poor person to be so conveyed, or give directly or indirectly any money, relief, or assistance, or afford, or procure to be afforded, any facility for such conveyance, or make any offer, promise, or use any threat to induce any poor person to depart from such parish."

[*Lord Campbell*, C. J. Suppose the pauper, her husband being dead, wished to return to the parish where her surviving relatives were, and which must be taken to be the place of her maiden settlement, might she not lawfully go?]

But it would be a misapplication of the parish funds to pay the expenses of travelling from the parish to which she was chargeable to any other parish. Sect. 6 was for the protection of parishes, and to prevent an evasion of one of the objects of the statute by changing the burden of maintaining the pauper. An illegal removal by parish officers does not displace residence; *Rex v. Great Salkeld*, 6 Mau. & S. 408; and the respondent parish cannot take advantage of the wrongful act of its own officers. In *Rex v. Astley*, 4 Dougl. 389, there was no wrongful act by the parish officers. As to the other alleged breaks of residence, there was none on the occasion of her writing to her landlady to give up her lodgings in St. Marylebone parish; and when her husband went to Reigate, and worked there for six months, until his death, he was constructively resident in St. Marylebone. *Reg. v. Glossop*, 12 Q. B. 117; 12 Jur. 1071. Secondly, the pauper was irremovable, under this order, from St. Marylebone, during the first year of her widowhood, by sect. 2 of stat. 9 & 10 Vict. c. 66.

[*Coleridge*, J. Suppose she resided in St. Marylebone with her husband at the time of his death, and of her own accord went away for three months.

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Lord Campbell, C. J. Suppose she went away, and gained a settlement in another parish in her own right, might she not be removed to it ?]

No; sect. 2 is studiously framed differently from sect. 1; it enacts that she shall not be removed "for twelve calendar months next after his death, if she so long continue a widow." There is no proviso, "unless she has voluntarily removed herself, or has acquired a domicile elsewhere." Any inquiry as to where she is during the twelve months is immaterial.

[*Lord Campbell, C. J.* Then the section ought to have said that she should be irremovable during any part of the twelve months.]

The right of irremovability from her husband's parish, under sect. 2, resembles the widow's quarantine at common law; she does not lose the right to support from her husband's estate by absence for some of the forty days. [He cited *Reg. v. Whissendine*, 2 Q. B. 450; 6 Jur. 192. *Reg. v. Halifax*, 12 Q. B. 111; 12 Jur. 789. *Rex v. Llanbedergoch*, 7 T. R. 101.]

Huddleston, contra. First, the only break in the residence which the respondents rely upon is that caused by the pauper going to Brighton in November, 1847. The facts show that it was her intention to quit St. Marylebone, and to reside with her mother at Brighton.

[*Lord Campbell, C. J.* After the suggestion and advice of the parish officers of St. Marylebone.]

If her going to Brighton was not voluntary, she might have returned to St. Marylebone. In *Reg. v. Tacolnestone*, 12 Q. B. 157; 13 Jur. 80, there was clear evidence of the pauper's *animus revertendi*. The question is not whether there was any illegality on the part of the parish officers of St. Marylebone, but what was the intention of the pauper.

[*Lord Campbell, C. J.* If that intention was fraudulently created in her mind by the parish officers of St. Marylebone, what effect is to be given to it? Suppose she had been removed by an order which she appealed against, and which was quashed, would she lose her irremovability?

Coleridge, J., referred to *Reg. v. All Saints Derby*, 13 Jur. 1100.]

At any rate, it ought to have been found by the sessions that the pauper did not go voluntarily, and that the conduct of the parish officer was "contrary to law, with intent to cause" the pauper "to become chargeable" to Brighton, within sect. 6 of stat. 9 & 10 Vict. c. 66. This court will not infer a fraudulent or a guilty intent, unless the facts found exclude any other inference. *St. Paul's, Walden v. Kempton*, Fol. 254, 3d ed. Buller, J., in *Rex v. Fillongley*, 1 T. R. 458, 461. *Rex v. Weston*, Burr. S. C. 166. *Rex v. Llanbedergoch*, 7 T. R. 101. *Rex v. Tillingham*, 1 B. & Ad. 180.

[*Pashley* referred to *Rex v. Woolpit*, 4 Ad. & El. 205, and *Reg. v. Tacolnestone*, 12 Q. B. 157; 13 Jur. 80.] Secondly, constructive residence in a parish is not sufficient to render a widow irremovable for twelve months after the death of husband, under sect. 2 of stat. 9 & 10 Vict. c. 66.

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[*Lord Campbell, C. J.* If we think the husband was constructively resident in St. Marylebone, the pauper was also constructively residing there; she was not separated from her husband.]

If there was a break in the residence, her right to irremovability under sect. 2 is gone.

LORD CAMPBELL, C. J. The Quarter Sessions have not supplied us with sufficient materials to determine this question. They state pregnant evidence of illegality of conduct in the officers of the respondent parish, but they have not drawn from it any inference as to the intent with which the assistance was given to the pauper, and the case must go back to the Quarter Sessions, that they may find the intent with which the parish officers recommended her to go back to Brighton. But I may take this opportunity of saying, that if they had found that this was done with intent to cause her to become chargeable to Brighton, I am of opinion that there would be no legal interruption of the residence of the pauper in St. Marylebone, and her subsequent residence with her mother in Brighton, without receiving relief, would relate back to the illegality of the relief given for facilitating her removal there. If we were at liberty to draw an inference from the facts here stated, I should have no difficulty in saying that was the intent of the parish officer who told the pauper that Brighton was her parish. Is not that telling her that she must go and get relief there? And if that was his intention, it would be an infraction of sect. 6 of stat. 9 & 10 Vict. c. 66, and the pauper would be irremovable. If the sessions come to that conclusion, there will be no occasion to resort to this court again.

PATTESON, J. I am very much afraid of abandoning the wholesome rule laid down by Lord Kenyon in several cases, (see *Rex v. Llanbedergoch*, 7 T. R. 101,) that this court will not infer fraud or illegality when the Court of Quarter Sessions has not found it. But I agree that we may state our opinion, that if the sessions had found that the 10s. was given to the pauper, and that she was sent by the parish officers to the railway station, with the intent to make her chargeable to Brighton, the case would be plainly within sect. 6 of the stat. 9 & 10 Vict. c. 66, and she would be entitled to remain, both under sect. 1 and sect. 2, in the parish of St. Marylebone with her husband, and for a year after her husband died. It would be the same as if she had been removed under an order which was afterwards quashed. The remaining with her mother three weeks at Brighton, and all the subsequent circumstances, would be referred to the fact of her having gone to Brighton involuntarily, and under a sort of compulsion, the effect of which would be displaced by her subsequent return.

COLERIDGE, J. I have a great objection to the court drawing an inference of legal or moral fraud. But I have little doubt that the sessions may reasonably find the intent of the parish officers to make the pauper chargeable to Brighton; and then her going to Brighton

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and staying there did not constitute a break in her residence in the respondent parish, and therefore she was not irremovable under sect. 1 or sect. 2 of stat. 9 & 10 Vict. c. 66. It is said, however, that we are not to look at the conduct and intent of the parish officers, but at what was the intention of the pauper; and that if it was her intention to stay permanently at Brighton, a break of residence was effected. But I think it is not safe to take that view of the case, and that we must look to the circumstances under which the pauper was removed. If the removal was an offence by the parish officers, it cannot be treated as having the effect of a break of residence; and as to her remaining at Brighton, the same influence may be presumed to remain in her mind, and her subsequent conduct takes its complexion from the illegal removal.

WIGHTMAN, J. The question is, whether what occurred on the 2d of November, 1847, makes a break in the residence of the pauper. I entertain little doubt that if she had chosen voluntarily to go to the place of her legal settlement, she might have relieved St. Marylebone from the liability of maintaining her, and have attached it to the parish to which it primarily belonged. But the question is, whether she went to Brighton by the interference of the parish officers, or whether she went there voluntarily. Stat. 9 & 10 Vict. c. 66, contemplates two states of things—one a removal generally, the other under a warrant of removal; and connecting the 1st and 6th sections together, when the parish officers, for the purpose of shifting the liability of maintaining a pauper, take the initiative for removing the pauper to another parish, though there is no warrant of removal, it is an infraction of sect. 6, and ineffectual to interrupt the continuity of the residence. The facts in this case show a removal in effect by the parish officers, and if it was with the intent to make the pauper chargeable to Brighton, she would be irremovable. There is a rule which prevents us from drawing that conclusion: it is to be drawn from the premises by the Quarter Sessions, and they would, in my opinion, be justified in drawing it; and if they do, the order of removal will be quashed.

LORD CAMPBELL, C. J. The question on the 2d section does not arise upon this order; but if the parties desire to know our opinion, we have an impression that if there was once an interruption of the residence, the privilege of the widow to be irremovable for twelve months after her husband's death, under that section, is gone.

Case sent back to be reheard.

Schmalz v. Avery.

SCHMALZ v. AVERY.

Hilary Vacation, February 22, 1851.

Principal and Agent—Estoppel—When Agent may sue as Principal.

A person contracting as agent for an unknown and unnamed principal may himself sue as principal, unless the defendant relied on his character as agent only, and would not have contracted with him as principal if he had known him so to be.

Declaration in *assumpsit* on a charter party made between the defendant, therein described as the owner of the ship, and S., (the plaintiff,) merchant and freighter, for not taking the cargo on board. Plea, *non assumpsit*. The charter party stated that it was made by the plaintiff as agent for the freighter, and concluded thus: "This charter party being concluded on behalf of another party, it is agreed that all responsibility on the part of S. & Co. ceases as soon as the cargo is shipped." At the trial it was proved that plaintiff was the real freighter:—

Held, that plaintiff was entitled to sue as principal, notwithstanding the terms of the charter party.

ASSUMPSIT on a charter party. The declaration stated the instrument as "a certain charter party of affreightment, then made between the defendant, therein described as the owner of the good ship or vessel called," &c., "of the one part, and the plaintiff, merchant and freighter, of the other part." Breach, that although the plaintiff had always, from the time of making the said agreement, been ready and willing to load, according to the terms of and in the manner specified by the said charter party, a complete cargo of large steam coals, not exceeding what the said ship could reasonably stow and carry over and above her tackle, &c., at any spout not above Howden, or from so near to any safe spout not above Howden as the said ship could safely get, of which the defendant had notice, yet the defendant did not sail or proceed with all convenient speed, or at any time after the making of the said agreement and charter party as aforesaid, to any safe spout, not above, at, or near Howden as aforesaid, &c. First plea, *non assumpsit*. On the trial, before Wightman, J., at the Newcastle Summer assizes in 1850, the following "memorandum for charter," signed by the defendant, was put in: "Newcastle-upon-Tyne, 23d day of July, 1849. It is this day mutually agreed between Mr. G. Avery, owner of the good ship or vessel called," &c., "now in the Tyne, on the one part, and G. Schmalz & Co., merchants, as agents of the freighter, of the other part, that the said ship, being tight," &c., "shall, with all convenient speed, sail and proceed to a safe spout not above Howden, or so near thereunto as she may safely get, and there load from the agents of the said freighter, in regular turn, a complete cargo of large steam coal, not exceeding what she can reasonably stow and carry over and above her tackle," &c.; "and being so loaded, shall therewith proceed to Swinemunde, and deliver the same to the said freighter, or his assigns, on being paid freight at and after the rate of," &c. Among other stipulations it contained the

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following: "*This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmalz & Co. cease as soon as the cargo is shipped.*" The clause in italics appeared in a printed form of charter, which was used by the plaintiff and his partners, and, it was said, was, in the present instance, inadvertently omitted to be struck out; and evidence was given, that in a conversation between the defendant and the partner of the plaintiff, the latter had stated that the plaintiff was really interested, and that it was a speculation of his own. It was objected for the defendant that there was a variance between the charter party as declared upon and as given in evidence. The learned judge inclined to the opinion that the plaintiff was concluded by the terms of the charter party from saying that he was not agent, and that the evidence altered the written contract. A verdict was entered for the defendant on the first issue, and for the plaintiff on the second and third issues, leave being reserved to move to enter a verdict for the plaintiff for 5*l.* 10*s.* damages. In the following Michaelmas term, (Nov. 4,) —

Knowles moved for a rule *nisi* accordingly, citing *Higgins v. Senior*, 8 M. & W. 834, and *Atkinson v. Amber*, 2 Esp. 494.

November 6. The court granted a rule *nisi*.

At the sittings in Banc after Hilary term,¹ *Watson* and *Unthank* showed cause. The evidence did not support the declaration, in which the plaintiff described himself as principal. A party who has entered into a contract as agent is not entitled to maintain an action, as principal, on the contract, while it remains purely executory. *Humble v. Hunter*, 12 Q. B. 310; 12 Jur. 1021. *Bickerton v. Burrell*, 5 Mau. & S. 383. If the defendant had known that the plaintiff was principal, he might not have dealt with him. Again: the contract is not mutual; an action for not loading a cargo would not have laid against the plaintiff. Again: if the ship had sailed, and arrived at the end of its voyage, the clause in the charter party excluding the responsibility of *Schmalz & Co.* would have applied.

[*Wightman, J.* But suppose it was proved that *Schmalz* was the real principal, and that he made the contract in this form, would he not be liable? In *Jenkins v. Hutchinson*, 13 Jur. 763, there was no principal; here *Schmalz* was principal, though he said he was agent.]

But he ought not to be allowed to contradict his own written statement in the contract.

[*Patteson, J.* *Jenkins v. Hutchinson*, which has been much canvassed, proceeded upon the principle, that there was no binding contract upon any one; in this case there is a contract binding upon the defendant until the loading of the ship.]

If an unknown principal does not come forward, there would be a remedy against the party who had made the contract for him for not disclosing him.

¹ February 8, before *PATTESON, COLERIDGE, and WIGHTMAN, JJ.*

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Knowles and *Udall*, contra. The plaintiff proved that the freighter was principal, and the objection, that the evidence contradicted the written evidence, cannot now be taken. In *Humble v. Hunter*, 12 Q. B. 310; 12 Jur. 1021, the objection was taken at the time when the evidence was offered; and there was a principal, who could sue and be sued. Further — "parol evidence is always necessary, to show that the party sued is the person making the contract and bound by it." *Trueman v. Loder*, 11 Ad. & El. 589, 594; 4 Jur. 934, 938. In *Bickerton v. Burrell*, 5 Mau. & S. 383, the contract was signed by the plaintiff "for C. Richardson," the principal; and the judgment of Lord Ellenborough proceeded upon that fact. The real principal may always sue and be sued. In *Rayner v. Grote*, 15 M. & W. 359, the principal was named in the body of the contract; and the court held, that the agent might sue in his own name for the non-acceptance of goods, throwing some doubt upon the decision in *Bickerton v. Burrell*. The third proposition, drawn from the cases in the note to *Thompson v. Davenport*, 2 Smith's L. C. 223, is, "that if A state himself to be an agent, but have really no principal, he is, in law, himself the principal."

[*Coleridge*, J. That is said of the case in which A is the defendant.]

But that removes the objection, that the contract is not mutual.

[They cited *Higgins v. Senior*, 8 M. & W. 834, 844; *Sims v. Bond*, 5 B. & Ad. 389, 393; and *Jenkins v. Hutchinson*, 13 Jur. 763, 765.]

[*Patteson*, J. In *Smyth v. Anderson*, 7 C. B. 21, 35; 13 Jur. 211, 213, Maule, J., observes, that *Thomson v. Davenport*, 9 B. & Cr. 78, "in effect decides, that if the principal is not named, it is the same as if none exists."]

Where an agent has signed a contract affecting to have a principal, and there is no principal but himself, there is no distinction between his liability to be sued and his ability to sue. *Railton v. Hodgson*, note (a) to *Addison v. Gandasequi*, 4 Taunt. 575. *Athyns v. Ambler*, 2 Esp. 493.

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the court. This was an action of *assumpsit* on a charter party, not under seal, against the defendant, a ship owner, for not taking the cargo on board according to the charter party.

The question raised on the plea of *non assumpsit* is, whether the action will lie at the suit of the present plaintiff. The charter party, in terms, states that it is made by Schmalz & Co., the plaintiffs, as agents for the freighter. It then states the terms of the contract, and concludes with these words: "This charter party being concluded on behalf of another party, it is agreed that all responsibility on the part of Schmalz & Co. ceases as soon as the cargo is shipped." The declaration treats the charter party as made between the plaintiff and the defendant, without mentioning the character of the plaintiff as agent, and without any reference to the concluding clause, thereby treating the plaintiff as principal in the contract.

At the trial it was proved that the plaintiff was, in point of fact, the real freighter. No objection was taken to the admissibility of the evidence by which that fact was established; but at the close of the

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plaintiff's case it was objected, that he was concluded by the terms of the charter party, and fixed with the character of agent; so that he could sue only in that character, and consequently that there was a variance between the declaration and the proof. A verdict was found for the defendant, with liberty to enter a verdict for the plaintiff for 5*l.* 10*s.*, if the court should be of opinion that he was entitled to sue as principal, notwithstanding the terms of the charter party; and a rule *nisi* was obtained so to enter it.

We are of opinion that the rule must be made absolute. It is conceded, that if there had been a third party who was the real freighter, such third party might have sued, although his name was not disclosed in the charter party; but the question is, whether the plaintiff can fill both characters of agent and principal, or rather whether he can repudiate that of agent and adopt that of principal, both characters being referred to in the charter party, but the name of the principal not being therein mentioned.

The cases principally relied on for the defendant were *Bickerton v. Burrell*, 5 *Mau. & S.* 383, and *Rayner v. Grote*, 15 *M. & W.* 359, in both which cases the supposed principal was named in the instrument of contract; also the case of *Humble v. Hunter*, 12 *Q. B.* 310; 12 *Jur.* 1021. In the case of *Bickerton v. Burrell*, the plaintiff, on the face of the contract, professed to enter into it as agent for C. Richardson. At the trial, C. Richardson was called to prove that her name was used without her knowledge, and that she had nothing to do with the contract. Lord Ellenborough refused to receive the evidence, and nonsuited the plaintiff. A rule *nisi* to set aside the nonsuit was obtained, but, upon argument, was discharged, on the ground that a person who has exhibited himself as agent for another, *whom he names*, cannot at once throw off that character, and put himself forward as principal, without any communication or notice to the other party. All the judges relied on the want of such notice, which seems to have been the chief ground of the decision; for they considered that the defendant was thereby placed in great difficulty, as he had contracted, in point of law, with Richardson, and not with the plaintiff, and might have no means of ascertaining or even conjecturing that she was not the real party. The soundness of that ground of decision was somewhat doubted in the late case of *Rayner v. Grote*. There the plaintiff contracted as agent for Johnson, but was, in truth, himself the principal; he sued the defendant for not accepting and paying for the goods. The defendant had accepted and paid for a great part of the goods sold, and knew, before he refused the residue, that the plaintiff was the real principal; and so the case was distinguishable from that of *Bickerton v. Burrell* upon the very ground on which that decision proceeded, and the plaintiff was held to be entitled to sue. The case of *Humble v. Hunter* was an action by Grace Humble, on a charter party signed by her son, J. C. Humble, in which he was described as the "owner of the good ship or vessel called the *Ann*." There the son was called at the trial, and, after objection taken to his admissibility, proved that he executed as agent for the plaintiff, and the plaintiff had a verdict. The court, however, granted a new trial,

on the ground that it was not competent for a third party to come in and claim to be the principal, and so contradict the express statement of the contract itself. The case turned upon the form of the contract; for it was conceded, that if the words "owner of the good ship," &c., had been omitted, the plaintiff might have sued, on showing that she was the real owner, and that the son was her agent only. Such evidence would not have contradicted the contract, but would only have let in a third party who was really interested, in conformity with the current of authorities in cases of contracts executed by agents, and in their own names. The case of *Jenkins v. Hutchinson*, 13 Jur. 763, was also cited for the defendant, but it proceeded on a different ground, and is not applicable to the present question. There the defendant was sought to be charged as principal on a charter party executed by him, on the face of it, as agent for Barnes; he had, in truth, no authority from Barnes, nor was he himself interested at all; and the court held that he could not be sued as principal without showing that he really was so.

A distinction was taken on the argument in the present case, by the defendant's counsel, between an executed and an executory contract; and it was said, that whatever might be the rule in the former class of cases, where the defendant has received the benefit of the contract, and it is probably immaterial to him whom he pays, yet that in the latter class the defendant cannot be properly held answerable to B, having expressly contracted with A; and a passage in the judgment of the court in the case of *Rayner v. Grote* was much relied on, which is this: "If, indeed, the contract had been wholly unperformed, and one which the plaintiff, by merely proving himself to be the real principal, was seeking to enforce, the question might admit of some doubt. In many cases, such as, for instance, the case of contracts, in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then show himself to be the real principal, and sue in his own name; and it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule." With this passage we entirely agree; but it is plain that it is applicable only to cases where the supposed principal is named in the contract; if he be not named, it is impossible that the other party can have been in any way induced to enter into the contract by any of the reasons suggested.

In the present case, the names of the supposed freighters not being inserted, no inducement to enter into the contract, from the supposed solvency of the freighters, can be surmised. Any one who could prove himself to have been the real freighter and principal, whether solvent or not, might most unquestionably have been sued on this charter party. The defendant cannot have been in any way prejudiced in respect of any supposed reliance on the solvency of the freighter, since the freighter is admitted to have been unknown to him, and he did not think it necessary to inquire who he was. It is, indeed, possible that he may have been contented to take any

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freighter and principal, provided it was not the present plaintiff; and he may have relied on the terms of the charter party, indicating that the plaintiff was an agent only, being willing to accept of any one else, be he who he might, as principal.

After all, therefore, the question is reduced to this, whether we are to assume that the defendant did so rely on the character of the plaintiff as agent only, and would not have contracted with him as principal if he had known him so to be; and are to lay it down as a broad rule, that a person contracting as agent for an unknown and unnamed principal is precluded from saying, "I am myself that principal." Doubtless, his saying so does in some measure contradict the written contract, especially the concluding clause, which says, "This charter party being concluded on behalf of another party," &c., for there was no such other party. It may be that the plaintiff entered into the charter party for some other party, who had not absolutely authorized him to do so, and afterwards declined taking it; or it may be that he intended originally to be the principal. In either case the charter party would be, strictly speaking, contradicted; yet the defendant does not appear to be prejudiced, for as he was regardless who the real freighter was, it should seem that he trusted for his freight to his lien on the cargo. But there is no contradiction of a charter party if the plaintiff can be considered as filling two characters, namely, those of agent and principal. A man cannot, in strict propriety of speech, be said to be an agent to himself; yet, in a contract of this description, we see no absurdity in saying that he might fill both characters — that he might contract as agent for the freighter, whoever that freighter might turn out to be, and might still adopt that character of freighter himself if he chose. There is nothing in the argument that the plaintiff's responsibility is expressly made to cease "as soon as the cargo is shipped," for that limitation plainly applies only to his character as agent, and, being real principal, his responsibility would unquestionably continue after the cargo was shipped.

Upon the whole, we are of opinion that this rule must be made absolute.

Rule absolute.

ELLIOTT v. CLAYTON.¹

Hilary Vacation, February 22, 1851.

Debt — Bankruptcy of Plaintiff — Claim of Assignees.

Debt for work and labor as a surgeon and apothecary, and for medicines found and administered. Plea — The bankruptcy of plaintiff, and that the debt was claimed by the assignees. Replication — That the labor was personal labor bestowed after the bankruptcy, and done for the necessary present maintenance of plaintiff and his family; and the medicines were purchased out of the earnings of his personal labor done after his bankruptcy; and that the medicines were increased in value by plaintiff's personal labor, and were found and

¹ 15 Jur. 293.

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administered for the necessary present maintenance of plaintiff and his family. Rejoinder—That the labor was not personal labor, nor the medicines purchased out of the earnings of personal labor, nor the medicines found or administered for the necessary present maintenance of plaintiff and family. Plaintiff was a general medical practitioner: he had filed a declaration of insolvency, and was an uncertificated bankrupt. By an arrangement with a friend, who had purchased his stock of medicines, he continued in possession of them on credit, carried on his business as before, and was supplied with fresh medicines on credit from wholesale houses. Plaintiff attended defendant, giving him the benefit of his skill, and furnishing the medicines which he thought necessary:—

Held, that plaintiff was carrying on his business as a medical practitioner, and therefore the replication was not proved, &c.

DEBT. The declaration stated, that the defendant was indebted to the plaintiff in 23*l.* 3*s.* 6*d.* for the work, care, diligence, and attendance of the plaintiff, by him, before that time, performed and bestowed as a surgeon and apothecary for the said defendant, and at his request, in and about the healing and curing the defendant and divers other persons of divers diseases, disorders and maladies, and in and about endeavoring to heal and cure the defendant and divers other persons of divers other diseases, disorders, and maladies; and also for divers medicines and other necessary things by the plaintiff before that time found and provided, administered, delivered, and applied on those occasions for the defendant, and at his request.

The first and second pleas were pleaded to the sum of 6*s.* 6*d.*, parcel of the debt in the declaration mentioned, as to which the plaintiff entered a *nolle prosequi*. Fourth plea, as to the residue of the debt in the declaration mentioned, that after the passing of stat. 7 & 8 Vict. c. 96, the plaintiff was a surgeon and apothecary, trader, dealer, and chapman, and a trader within and subject to the statutes then in force concerning bankrupts; and that the plaintiff, before the accruing of the said residue of the debt in the declaration mentioned, duly filed a declaration in writing, in the form required by the statute in such case made and provided, signed, &c.; that he, the plaintiff, was unable to meet his engagements, and thereupon, and before the accruing of the said residue of the debt in the declaration mentioned, the plaintiff became and was a bankrupt; that Joseph Callow was appointed official assignee of the estate and effects of the plaintiff; and that after the commencement of this suit, and after the accruing of the said residue of the debt in the declaration mentioned, the said Joseph Callow, as such assignee, required the defendant to pay him the said residue of the debt in the declaration mentioned. Verification. Replication to fourth plea—that the said work, care, diligence, and attendance of the plaintiff by him performed and bestowed as a surgeon and apothecary for the defendant, as in the declaration mentioned, so far as the same relate to the said residue of the said debt, were and every part of the same was merely the personal labor of the plaintiff in that behalf performed and bestowed after the filing by the plaintiff of the said declaration that he was unable to meet his engagements, and after he had become and was a bankrupt, as in the said fourth plea mentioned, and were and every part of the same was then done, performed, given, and bestowed, in and for the necessary present maintenance, support, and livelihood of the plaintiff and his

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family; that the said medicines and other necessary things by the plaintiff found, provided, administered, delivered, and applied for the defendant, as in the said declaration mentioned, so far as the same relate to the residue of the said debt, were and every part of the same was found, provided, administered, delivered, and applied by the plaintiff, as such surgeon and apothecary as aforesaid, after the filing by the plaintiff of the said declaration that he was unable to meet his engagements, and after he had become and was a bankrupt, as in the said fourth plea mentioned, and then were and every part of the same was purchased and obtained by the plaintiff from, by, and out of the earnings and profits of his personal labor, done and performed after the filing of the said declaration that he was unable to meet his engagements, and after he had become and was a bankrupt, as in the said fourth plea mentioned, and not otherwise; and that the said medicines and other necessary things were and every part of the same was then greatly increased in value and price by the personal labor of the plaintiff in preparing, mixing, compounding, and administering the same; and that the said medicines and other necessary things were and every part of the same was then found, provided, administered, delivered, and applied by the plaintiff in and for the necessary present maintenance, support, and livelihood of the plaintiff and his family, and as a part of and incidental and necessary to his said personal labor, and in order that he might perform the said personal labor in the most advantageous manner for the necessary present maintenance, support, and livelihood of the plaintiff and his family.

Rejoinder, that the said work, care, diligence, and attendance of the plaintiff, in the said replication mentioned, were not, nor was any part of the same, merely the personal labor of the plaintiff, performed or bestowed in manner and form as in the said replication is alleged, nor were nor was any part of the same done, performed, given, or bestowed in or for the necessary present maintenance, support, or livelihood of the plaintiff or his family, in manner and form, &c.; nor were the said medicines and other necessary things in the said replication mentioned, nor was any part of the same, purchased or obtained by the plaintiff from, by, or out of the earnings or profits of his personal labor, done or performed in manner and form, &c.; nor were the said medicines and other necessary things, nor was any part of the same, found, provided, administered, delivered, or applied by the plaintiff in or for the necessary present maintenance, support, or livelihood of the plaintiff or his family, or as a part of, or incidental or necessary to, his said personal labor, or in order that he might perform the said personal labor in the most advantageous manner for the necessary present maintenance, support, or livelihood of the plaintiff or his family, in manner and form, &c. Conclusion to the country. Issue thereon.

On the trial, before Wilde, C. J., at the Surrey Spring assizes in 1850, it appeared that the action was brought by the plaintiff, who was a surgeon and apothecary, and a member of the Royal College of Surgeons, to recover the sum of 23*l.* 3*s.* 6*d.* for work and attend-

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ance done and performed by him as a surgeon and apothecary, and for medicines and other necessary things found and provided for the defendant between the 30th of October, 1845, and the 15th of January, 1848. The plaintiff petitioned the Insolvent Debtors Court, and obtained a protection order in 1843; and he became a bankrupt in November, 1845. Immediately after his bankruptcy he re-opened his shop, bought on credit a fresh stock of drugs, and during the period of the suspension of his certificate, from the 4th of November, 1845, to the 4th of March, 1848, continued to carry on his business and practice undisturbed by his assignee, and to collect and get in his debts. He kept an apprentice to assist him in making up the drugs, and a boy to carry them out to his customers. The amount claimed for personal labor, attendances, &c., was under 5*l*., the remainder being for medicines; but these were greatly increased in value by the skill of the plaintiff in preparing the same, the real cost of the drugs being comparatively nothing. There was also evidence that the plaintiff had no pecuniary resources, except the profits which he derived from his professional labors, subsequently to his bankruptcy, and an allowance of 10*s*. a week out of his estate.

It was contended for the defendant, that the allegations in the replication did not show that the medicines, which were bought on credit, were the produce merely of the plaintiff's personal labor; and that there was no evidence that the work was for the present necessary support of himself and his family. The lord chief justice was of opinion that the replication was divisible, and that the action was brought in respect of personal labor, though it included something else incidental thereto. The jury gave a verdict for the plaintiff for 22*l*. 12*s*., leave being reserved to the defendant to move to enter a nonsuit, or to reduce the amount of the damages. In the following Easter Term, April 22,¹—

Bramwell moved accordingly. The 63d section of stat. 6 Geo. 4, c. 16, makes no such qualification as the cases have introduced, as to the disability of an uncertificated bankrupt to maintain an action: the object of that section was to prevent a bankrupt carrying on trade before he had obtained his certificate.

[*Wightman*, J. Or if he did carry on trade, that it should be for the benefit of his assignees.]

In *Silk v. Osborn*, 1 Esp. 140, the assignees had not intervened.

[*Wightman*, J. The opinion of Lord Kenyon goes the length of saying, that if they had intervened, that would not be a defence to third persons.

Lord Campbell, C. J. There may be a distinction between labor incident to the sale of goods by the bankrupt, and goods supplied to the bankrupt incident to his labor.

Patteson, J., referred to *Crofton v. Poole*, 1 B. & Ad. 568.

Lord Campbell, C. J. The replication is novel.]

¹ Before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and WIGHTMAN, JJ.

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April 24. The court granted a rule nisi; against which, at the sittings in banc, after Michaelmas term,¹ —

G. Francis showed cause. First, the evidence supported the allegations in the replication. Though an uncertificated bankrupt has no property but the earnings of his personal labor, the drugs in this case were so mixed up with it as to be recoverable. The value of personal labor bestowed upon materials has always been held recoverable. *Silk v. Osborn*, 1 Esp. 140. *Evans v. Brown*, Id. 169. *Chippendall v. Tomlinson*, 4 Dougl. 318. 1 Cooke's Bank. L. 431, 8th ed. *Williams v. Chambers*, 10 Q. B. 337. [He also cited *Beckham v. Drake*, 8 M. & W. 846; s. c., in error, in Exchequer Chamber, 11 M. & W. 315, and in the House of Lords, 13 Jur. 921.]

[*Coleridge, J.* Suppose drugs are delivered to a medical practitioner who is an uncertificated bankrupt, could he say that he was only to pay for them out of the proceeds of his personal labor? Here the goods were handed to the plaintiff, expressly on credit.]

Secondly, the replication is divisible.

[*Erle, J.* The plea pleads the three matters.]

Bramwell, contra. The object of the 63d section of stat. 6 Geo. 4, c. 16, will be defeated by holding this replication to be good. A general practitioner is not bound to furnish drugs. After the drugs were bought, they belonged to the assignees of the plaintiff.

[*Erle, J.* In *Beckam v. Drake*, 13 Jur. 921, the inclination of the House of Lords was to extend the law which assures the fruit of his personal labor to a bankrupt.]

The only point in that case was, whether the cause of action was a personal wrong, or in the nature of a debt. This case falls within the decision in *Crofton v. Poole*, 1 B. & Ad. 568. If the bankrupt mixes up his personal labor with goods, the assignees may sue for the value of it.

[*Wightman, J.* Suppose a carpenter, who found the nails which he used in his occupation, and no further traded in them than that they were the necessary implements of his occupation, could his assignees recover in respect of his work and labor? The nails form almost an infinitesimal part of the value of his work.]

On the other hand, where a sculptor purchased the marble for a statue or bust, which he executed, could not his assignees maintain an action for the value of it?

[*Erle, J.* If he executed the statue or bust, not for sale, but upon a contract, the assignees might not be entitled to recover, because that would be letting out the insolvent, and contracting for his labor, to use Lord Mansfield's phrase in *Chippendall v. Tomlinson*, 1 Cooke's Bank. L. 431, 432, 8th ed.]

Cur. adv. vult.

COLERIDGE J., now delivered the judgment of the court. This was

¹ December 5, before COLERIDGE, WIGHTMAN, and ERLE, JJ. PATTESON, J., had gone to chambers.

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a rule argued before my brothers Wightman, Erle, and myself, to enter a verdict for the defendant, or to arrest the judgment.

The action was for work and labor as a surgeon and apothecary, and for goods sold and delivered, with a count on an account stated, on which nothing turned. The plea was the bankruptcy of the plaintiff, and that the debt was claimed by the assignees. The replication was in effect, that the labor was personal labor bestowed after the bankruptcy, and done for the present necessary support of the plaintiff and his family, and the goods medicines purchased out of the proceeds of his personal labor, and increased in value by the plaintiff's personal labor, and supplied for the present necessary support of the plaintiff and his family. The rejoinder traversed that the labor was personal labor, and the goods medicines purchased out of the proceeds of personal labor as alleged in the replication.

It appeared that the plaintiff was a general medical practitioner; he had filed a declaration of insolvency, and was an uncertificated bankrupt. By some arrangement with a friend, who had purchased his stock of medicines, he continued in possession of them on credit, carried on his business as before, and was supplied with fresh medicines on credit from wholesale houses. Under these circumstances the debt was contracted, the plaintiff attending the defendant, giving him the benefit of his skill, and furnishing the medicines which he thought necessary.

We have considered this case, and we are of opinion that this replication was not proved.

In *Crofton v. Poole*, 1 B. & Ad. 568, the plaintiff was an uncertificated bankrupt; his business was that of a furniture broker; the debt was contracted in the removal of the defendant's goods, and to do this the plaintiff had procured vans, supplied packing cases, and crates, and employed assistants in packing, unpacking, and removing the goods; some furniture he had cleaned and repaired, and found the necessary materials for those purposes. The court held that this was not a demand for mere personal labor, but that the plaintiff was, in substance, carrying on his business, and that the proceeds passed to the assignees.

So it appears to us here, that, in substance, the plaintiff was carrying on his business as a medical practitioner. He is in possession of his original stock of medicines on credit, he procures more on credit, and with these and his personal skill he is pursuing his occupation for profit. It would be to carry the principle laid down in *Chippendall v. Tomlinson*, 4 Dougl. 318, and *Silk v. Osborn*, 1 Esp. 140, far beyond what is reasonable, to apply it to a case like the present, which cannot be materially distinguished from *Crofton v. Poole*.

It is, therefore, unnecessary to say any thing as to the goodness of the replication, and the rule will be absolute to enter a verdict for the defendant.

Rule absolute.

Regina v. The Inhabitants of Brecknockshire.

REGINA v. THE INHABITANTS OF BRECKNOCKSHIRE.¹

Trinity Vacation, June 20 and 21, 1850.

Indictment — Non-repair of Bridge — Liability of County.

By stat. 2 & 3 Will. 4, c. 64, s. 26, it is enacted, that the isolated parts of counties in England and Wales, which are described in schedule (M) of the act, shall, as to the election of members to serve in Parliament, be considered as forming parts of the respective counties and divisions which are respectively mentioned in the fourth column of the said schedule in conjunction with the names of such isolated parts respectively. The schedule in the first column described that which, in the second column, it called an isolated part of the parish of G. as belonging to Brecknockshire, and then stated in the third column that such part was locally situated in Brecknockshire or Radnorshire, and then in the fourth column named Brecknockshire as the county to which it was to be transferred.

By stat. 7 & 8 Vict. c. 61, it is enacted, that every part of any county in England and Wales, which is detached from the main body of such county, should be considered, for all purposes, as forming part of that county of which it is considered a part for election purposes, by stat. 2 & 3 Will. 4, c. 64.

Upon an indictment against the inhabitants of Brecknockshire for non-repair of half a bridge, it was found, upon a special verdict, that the mid-channel of the River Wye had always formed the boundary between the counties of Brecon and Radnor, above and below, and partly within, the parish of G., but that before the passing of stat. 2 & 3 Will. 4, c. 64, the boundary receded, at a certain point within the parish, from the mid-channel, to the right bank of the river, and thence inland, at a slant, and then back to the mid-channel of the river, so as to include within Radnorshire a part of the river, and 470 acres of land, on its right bank, part of the parish of G. The special verdict then found that no other portion of the parish of G., on the right bank of the Wye, than the said 470 acres, ever was in the county of Radnor, and that no part of the said parish of G., which up to the passing of the stat. 2 & 3 Will. 4, c. 64, was situate in the county of Radnor, was isolated or detached from the remainder of the said county, unless it was the said portion of 470 acres. The special verdict further found, that the indicted bridge was within the parish of G., and crossed the River Wye between the points where the old boundaries of the counties of Radnor and Brecon left and returned to the mid-channel of the river, and that the only part of the bridge which was out of repair was that extending from the mid-channel to the right bank of the river:—

Held, that the inhabitants of Brecknockshire were liable to repair half the bridge, since it stood half in their county and half in Radnorshire; for that, upon such finding, it was clear that the 470 acres were the part of the parish of G. which was intended to be described in stat. 2 & 3 Will. 4, c. 64, as isolated from the main body the county of Radnor, and therefore to be transferred to the county of Brecon, though, in strictness, it was not isolated, but touched the remainder of the county on one side, and though it was inaccurately described in the first column of the schedule as belonging, at the time of the passing of the act, to Brecknockshire:—

Held, further, that the acts transferred to Brecknockshire not only the 470 acres, but also half the river, where it abutted upon them, so as to make the boundary between the counties of Radnor and Brecon run, there as elsewhere, *per medium filum aquæ*.

INDICTMENT for the non-repair of a bridge. At the trial, before Rolfe, B., at the Summer assizes for Herefordshire in 1848, the following special verdict was found: That the bridge is a common and public bridge over the River Wye, and that it is situate in the parish of Glasbury; that the parish of Glasbury contains about 8700 acres, of which a portion, consisting of about 2500 acres, is situate on the left bank of the Wye, and the residue on the right bank of the said river; that such portion of 2500 acres is and always was in the coun-

ty of Radnor, and that no portion of the said parish, situate on the left bank of the said river, is or ever was in the county of Brecon; that the River Wye flows through the said parish in nearly a north-easterly direction for about two miles and a half, and that the mid-channel of the said river forms, and always formed, the boundary between the counties of Brecon and Radnor, for a considerable distance both above and below the said parish, and also for about a mile of its course from the point where the river enters the said parish, down to a point called "The Staunces;" that before and at the time of the passing of the stat. 2 & 3 Will. 4, c. 64, intituled "An Act to settle and describe the divisions of counties and the limits of cities and boroughs in England and Wales, in so far as respects the election of members to serve in Parliament," the boundary of the said counties proceeded from the mid-channel to the right bank of the said river, at the said point called "The Staunces," and then first in a south-easterly direction for about a mile, and afterwards in a north-easterly direction for about three quarters of a mile, through that portion of the said parish which is situate on the right bank of the said river, to a place called "Heolygare," on the confines of the parish of Llanigon, in the said county of Brecon, which is a parish lying on the east and north-eastern side of the said parish of Glasbury, and then returned along the boundary of the said parishes of Glasbury and Llanigon to the mid-channel of the said river, at the point where the said river passes out of the said parish of Glasbury; that the said boundary, up to the time of the passing of the said act, included, in the county of Radnor, the remaining part of the said River Wye flowing through the said parish of Glasbury, and about 470 acres of the said parish lying on the right bank of the said river; [and that no part of the parish of Glasbury, which up to the time of the passing of the said act was situate in Radnorshire, was isolated or detached from the remainder of the said county, unless the said portion of 470 was so isolated or detached;]¹ and that no other portion of the said parish of Glasbury, on the right bank of the said river, than the said 470 acres, is or ever was in the county of Radnor; that Glasbury parish church is situate within the last-mentioned part of the said parish, and that the principal portion of the village of Glasbury is situate partly in such last-mentioned part, and partly in the parish of Glasbury on the left bank of the River Wye; that the remainder of the said parish of Glasbury, on the right bank of the said river, over and above the said part thereof consisting of 470 acres, contains about 5700 acres; and that such last-mentioned portion of the said parish adjoins the portion before mentioned as containing 470 acres, from the above-mentioned point, called "The Staunces," to the above-mentioned confines of the parish of Llanigon, and is and always was in the county of Brecon, and no part of it is or ever was in the county of Radnor; that the said bridge is built across the river at a point between the above-mentioned point, called "The Staunces," and the

¹ The passage between brackets was inserted by way of amendment, in the course of the argument.

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point where the boundary of the said counties, up to the time of the passing of the said act, returned to the mid-channel of the said river, as above mentioned; that the part of the said bridge which is stated in the presentment to be broken, ruinous, and in decay, is the part which extends from the mid-channel of the said river to the said abutment on the right bank thereof; and that such part was, at the time in that behalf in the said presentment mentioned, and still is, broken, ruinous, and in decay; that the said bridge is a timber bridge, resting on thirteen timber piers, with stone abutments at either end, and that the abutment on the right bank rises perpendicularly from the edge of the water, in a line with the right bank of the river, and that there is no water way through or under such abutment, or except under the part of the bridge which is of timber; the last-mentioned abutment and the road over it are in good repair; that before and until the passing of the stat. 7 & 8 Vict. c. 61, intituled "An Act to annex detached parts of counties to the counties in which they are situated," the said bridge was wholly within, and repairable by, the county of Radnor, and was repaired by the inhabitants of that county; that before the passing of the said act of the 2 & 3 Will. 4, c. 64, all persons qualified as electors to vote for a knight of the shire in respect of property within the portion of the said parish above described as consisting of 470 acres, always voted in respect of such property for a knight of the shire for the county of Radnor; that ever since the passing of the said act of Will. 4, all persons qualified as electors to vote for a knight of the shire in respect of property within the portion of the said parish above described as consisting of 470 acres, have been registered and have voted in respect of such property for a knight of the shire for the county of Brecon, and have not nor has any of them been registered or voted for a knight of the shire for the county of Radnor; that since the passing of the said act of the 7 & 8 Vict. c. 61, no part of the portion of the said parish above described as consisting of 470 acres has been assessed to the county rate for the county of Radnor, nor to the county rate for the county of Brecon; that the rates for the relief of the poor, and for the maintenance of the highways, made upon the inhabitants of the last-mentioned part of the said parish, have always been allowed by the justices for the county of Radnor, and not by the justices for the county of Brecon, and have been collected by and paid to the officers of that portion of the parish of Glasbury which is in Radnorshire; that the names of all persons residing within the said last-mentioned portion of the said parish liable to serve on juries have always been inserted in the list of jurors in and for the county of Radnor, and have not been inserted in the list of jurors nor served as such for the county of Brecon; that until and at the time of the passing of the stat. 7 & 8 Vict. c. 61, births, deaths, and marriages happening within the said portion of the parish of Glasbury so containing 470 acres, were registered by the registrar for the parish of Glasbury, Radnorshire. The case was argued by

Whateley, for the crown. The question is, whether the indicted

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bridge lies half in Brecknockshire and half in Radnorshire, because, if it does, it cannot be disputed that the common-law liability to repair attaches upon the inhabitants of Brecknockshire to repair the half which is situated in their county. *Reg. v. St. Peter's, York*, 2 Ld. Raym. 1249. *Rex v. Norwich*, 1 Str. 177. The question depends upon the true construction of stats. 2 & 3 Will. 4, c. 64, s. 26, and 7 & 8 Vict. c. 61, and upon the application of those statutes to the state of facts found by the special verdict. By stat. 2 & 3 Will. 4, c. 64, s. 26, it is enacted, that the *isolated* parts of counties in England and Wales, which are described in the schedule (M) to the statute annexed, shall, as to the election of members to serve in Parliament, be considered as forming parts of the respective counties and divisions which are respectively mentioned in the fourth column of the said schedule, in conjunction with the names of such isolated parts respectively. The schedule is in the following form:—

Counties to which the isolated parts belong.	Parishes of which the isolated parts consist.	Counties in which the isolated parts are locally situated.	Counties to which it is intended that the isolated parts should belong.
Brecknockshire.	Part of Glasbury parish.	Brecknockshire, or Radnorshire.	Brecknockshire.

By stat. 7 & 8 Vict. c. 61, s. 1, it is enacted, that every part of any county in England or Wales, which is *detached* from the main body of such county, shall be considered, for all purposes, as forming part of that county of which it is considered a part for the purposes of the election of members to serve in Parliament, under the provisions of the stat. 2 & 3 Will. 4, c. 64, s. 26, provided that nothing shall be construed to alter the county to which any such detached part shall be deemed to belong for the purpose of holding inquests. As to the construction of these acts—first, the words “isolated” and “detached” are used synonymously in them, and therefore neither of those words may be construed according to its strict grammatical interpretation; and, secondly, the description of the parish of Glasbury given in the schedule is clearly inaccurate, for the county to which it is commanded that an isolated part of Glasbury shall be transferred is the county of Brecon, and yet Brecknockshire is the county of which that same part of the parish is declared formerly to have been a part, which is absurd. It follows, that, in order properly to interpret the statutes, the word “Radnorshire” must be read for “Brecknockshire” in the first column. This may be well done, since by sect. 38 of stat. 2 & 3 Will. 4, c. 64, it is enacted that no misnomer or inaccurate description contained either in the act, or any schedule, shall in any wise prevent or abridge the operation of the act with respect to the subject of such description, provided the same shall be so designated as to be commonly understood. According, therefore, to the proposed reading, the statutes declare that a part of the parish of Glasbury was, before the passing of them, always isolated or detached from the county of Radnor, yet that it was, in point of law, a part of Radnorshire; and then they enact, that, for the future, such part shall be always deemed to be a part of Brecknockshire. The next question is, how such dec-

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luration and enactment, so read, should be applied to the facts found by the special verdict. Now, by the verdict, it is found that the ordinary boundary between Brecknockshire and Radnorshire, in the parts in and approaching the parish of Glasbury, always was the River Wye, and that Radnorshire was on the left, and Brecknockshire on the right bank, but that, at a particular point within the parish, the boundary line quitted the river and passed to the right bank, and so inland, at a slant, and then back to the river, so as to enclose within Radnorshire a portion of the parish of Glasbury, containing about 470 acres, on the right bank of the Wye; and then the verdict finds, that no part of Glasbury, situated in Radnorshire, was ever isolated or detached from the remainder of the said county, unless it was the said portion of 470 acres. The case, therefore, stands thus—that by the statutes it is declared that a part of Glasbury was always, in point of law, within Radnorshire, but, in point of fact, always isolated and detached from the rest of the county; and it is enacted that for the future, for all purposes, that part of Glasbury shall be deemed in law to be within Brecknockshire; and the verdict finds, that, if any part of Glasbury ever was isolated or detached from Radnorshire, it was the portion of 470 acres on the right bank of the Wye. It follows that those 470 acres are now, in point of law, a part of Brecknockshire. But, if that be so, the indicted bridge, which joins those 470 acres to the rest of the parish, is situated partly in Brecknockshire, and the inhabitants of Brecknockshire are, consequently, bound to repair the bridge.

Phipson, contra. The burthen of proof is on the other side. Unless the facts found by the special verdict clearly prove that the indicted bridge is partly within the county of Brecon, the inhabitants of that county are not liable to repair any part of it. In order to show that half the bridge is in Brecknockshire, it has been argued, first, that the statutes which have been referred to must be read in a particular way. But the statutes are unambiguous on the face of them, and therefore leave no room for any tortuous interpretation. To read "Radnorshire" for "Brecknockshire," in the first column of the schedule, would not be to correct an inaccuracy or clear an ambiguity, but to alter an enactment.

[*Erle, J.* Unless these 470 acres, part of Glasbury, belonged formerly to Radnorshire, it appears, by the verdict, that no part of Radnorshire was ever isolated or detached from the rest of the county; whereas, by the remainder of the schedule, it clearly appears that a part of Radnorshire was detached from the rest, and that it was desired that that part should be transferred to Brecknockshire. *Ut res magis valeat, quam pereat*, we must read "Radnorshire" in the first column.]

The special verdict, so far from showing that the 470 acres were always either detached or isolated from the rest of the parish, shows precisely the contrary, for it shows that they were always joined to the rest along the whole of one side of their superficies. It may be that the act of Parliament was passed under a misapprehension of locality, so that it is inapplicable, in point of fact, to any part of the parish of Glasbury; but it is sufficient now to say, that unless the

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verdict shows distinctly that these 470 acres are isolated or detached, it fails to show that they form part of Brecknockshire by virtue of the enactment, and so fails to show that the defendants are liable upon this indictment. But even supposing that the 470 acres are the isolated or detached part mentioned in the statutes, still the inhabitants of Brecknockshire are not liable to repair the bridge. In ordinary cases, where a bridge crosses a river, which is the boundary between two counties, the inhabitants of either county should repair half the bridge, because, in such case, one half the bridge lies in one county, and the other half in another, since the counties are divided *per medium filum aque*. But, in the present case, the division between the counties would, upon the assumption, be on the right bank of the Wye, and not *per median filum aque*, and so the bridge would be wholly within Radnorshire, because no further effect can be given to the enactment in stat. 2 & 3 Will. 4, c. 64, s. 26, than that it should pass, in point of law, the 470 acres on the right bank into Brecknockshire, since that statute was made only for the purpose of regulating the method of voting, and cannot, therefore, be supposed to have contemplated any part of the bed of the river.

Whateley, being about to reply, was stopped by the court.

PATTESON, J.¹ The acts of Parliament referred to are by no means easy to construe, nor is it easy to apply them to the facts found in the special verdict. But that verdict, now that it is amended, finds distinctly, that there is no other part of the parish of Glasbury to which the schedule of stat. 2 & 3 Will. 4, c. 64, when it was passed, could apply, unless it is the 470 acres on the right bank of the Wye. If, therefore, we hold that it did not apply to them, we hold also that the act had no meaning. The act declares, in effect, that there was, before it passed, a part of the parish of Glasbury which was situated locally in the county of Brecon, and enacts, that, from the time of its passing, that part should be deemed in law to be in Brecknockshire. By the finding of the verdict we are bound to say, that both declaration and enactment apply to the 470 acres on the right bank of the Wye. But then it is said, that, although we so decide, we must nevertheless give judgment for the defendants, because, in that case, the division of the counties will run along the right bank of the river, and not in its mid-channel, since stat. 2 & 3 Will. 4, c. 64, could only apply to land, and not to any part of the river. But it seems to me that the water is as much included in that act as the land. No distinction is made between them in terms; there is nothing to show that any was intended. Applying the words of the statute to the facts, it seems clear that the intendment of the declaration was, that the division of the counties was, up to a certain point, *per medium filum aque*, and that then, from that point to another, a portion of Radnorshire, consisting of half the river and 470 acres of land, impinged upon Brecknockshire; and the intendment of the enactment was, that, for the future, that part which so impinged should be deemed, for the

¹ LORD DENMAN, C. J., was absent on account of ill health.

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purposes of the election of members for the shire, to be in law a part of Brecknockshire. Stat. 7 & 8 Vict. c. 61, then enacts, that such same part shall be deemed in law to be part of Brecknockshire for all purposes; and the cases quoted by Mr. Whateley show that the inhabitants of Brecknockshire are liable to repair the half of this bridge, which, in consequence of such interpretation of the statutes, lies half in their county and half in Radnorshire. It was objected against this interpretation of the statutes, first, that although there was evidently, in fact, a misdescription of locality in stat. 2 & 3 Will. 4, c. 64, yet there was no ambiguity on the face of it, and that therefore it must not be made to apply to circumstances not plainly within the words; but it seems to me that the statute shows, upon the face of it, that those who made it doubted only whether the part of Glasbury on the right bank of the Wye was, before the statute, in Brecknockshire or Radnorshire, and that they therefore enacted, that, however it might have been before the statute, it should be deemed always after it to be in Brecknockshire. It was then objected, that since stat. 2 & 3 Will. 4, c. 64, could be referred only to purposes of election, it could not be held to contemplate the division in mid-river. But that does not seem to me to be true; the statute might well, as it seems to me, intend to transfer a right to vote in virtue of some incorporeal freehold exercised over the bed of the river by a freeholder holding corporeal freehold on its bank.

COLERIDGE, J. In my opinion we are not at liberty to say that no part of the parish of Glasbury was locally situated within the county of Brecon at the time of the passing of the stat. 2 & 3 Will. 4, c. 64; nor that no part is now within the county of Brecon, as well for all other purposes as for the purpose of voting. The stat. 2 & 3 Will. 4, c. 64, as I read it, expressly declares that a part of the parish was locally situated in Brecknockshire, and expressly enacts that such part shall for the future be deemed in law to be part of Brecknockshire for the purposes of that act. The stat. 7 & 8 Vict. c. 61, enacts that the same part shall for the future be deemed to be in Brecknockshire for all purposes. Then the only question is, whether the part of Glasbury described in the special verdict is the part within the enactments of the statutes. No doubt, if it is, that the description in the statute does not accurately tally with the description in the special verdict; but it is admitted by the verdict, that, if the part described in it be not the part of the parish intended in the statute, there is no other part which could be intended. Then it seems to me to follow that it was the part intended; and if it was, then it seems to me that the inaccuracy of the statute is no sufficient reason for holding that it must be inoperative. I was struck at first with the argument by which it was contended that the division between the two counties, as rearranged by the statutes, could not be *per medium filum aquæ*. But it seems to me that the difficulty was well answered by the suggestion that the statute for the regulation of voting might be taken to have intended to regulate the right to vote in respect of some freehold exercised over the bed of the Wye.

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ERLE, J. I agree with the defendants' counsel, that the part of Glasbury described in the special verdict is not, in the ordinary signification of the words, either isolated or detached from the other part of the parish in the county of Radnor. But I am of opinion that a particular meaning must be put upon those words in the two acts of Parliament which have been referred to, and that we are bound, for the reasons which have been given, to say, that the part of Glasbury described in the special verdict was the detached or isolated part intended by the statutes. The statutes call a part of the parish detached from the rest, which nevertheless touches at one side; we must also hold that such part is detached. That being so, we must further say where exactly the line of separation runs. It is, by virtue of the statutes, a line of separation not only between the two parts of the parish, but also between two counties. Then, according to the ordinary rule, it is *per medium filum aque*. I am of opinion, therefore, upon the whole, that our judgment must be for the crown.

Judgment for the crown.

EMDEN v. DEWEY.¹

Easter Term, April 23, 1851.

Insolvency — Peremptory Undertaking — Practice.

A peremptory undertaking will not be discharged or enlarged on the ground that it has been discovered, since it was given, that the defendant is insolvent.

ASSUMPSIT on a bill of exchange for 28*l.*, accepted by the deceased husband of the defendant. Plea, *plene administravit*. On the 31st of January last, the plaintiff gave a peremptory undertaking to try at the first sittings in this term. On the 19th of April, the plaintiff discovered that the defendant was insolvent, and had absconded; and on the same day he countermanded notice of trial. Upon affidavits stating these facts, —

Cole now moved for a rule *nisi* calling upon the defendant to show cause why the peremptory undertaking should not be discharged or enlarged; admitting that there was no reported case in which such an application had been granted on this ground.

LORD CAMPBELL, C. J. There is no authority for discharging or enlarging a peremptory undertaking on the ground that it has since been discovered that the defendant is insolvent. The discovery is too late after the peremptory undertaking has been given.

PATTESON, WIGHTMAN, and ERLE, JJ., concurred.

Rule refused.

¹ 15 Jur. 358.

Regina v. Richards.

REGINA v. RICHARDS.¹

Bail Court, Easter Term, April 17, 1851.

County Court — Notice of Claim — Judge refusing to adjudicate.

By the 29th rule of practice for the county courts, the claimant of goods taken under county court process is to deliver a particular of the goods claimed by him, and the grounds of his claim. Such grounds need not appear on the face of them to be valid; and therefore a claim to certain goods, stating that they had been assigned to the claimant by deed, was held to be sufficient, although it did not appear that the deed was good as against creditors.

If a judge of a county court refuse to adjudicate upon a claim, under sect. 118 of stat. 9 & 10 Vict. c. 95, in consequence of a mistake as to the sufficiency of a notice or other preliminary matter, a *mandamus* will be granted to compel him to hear and determine the claim.

THIS was a rule calling upon the judge of the Shropshire County Court to show cause why a writ of *mandamus* should not issue commanding him to proceed upon an interpleader summons, and to hear and determine the merits of a certain claim to two horses, two saddles, and two bridles. A plaint had been levied in the above court in the month of September, 1850, wherein one Davis was plaintiff, and one Holbrook defendant. The plaintiff, having obtained judgment, issued execution, and seized the articles in question. These were claimed by Messrs. Harper & Jones as their property, and the following were their particulars of claim:—

“To the clerk and high bailiff of the County Court of Shropshire, at Oswestry, and to whom else it may concern.

“The particulars of the claim made by us, and mentioned in the interpleader summons issued from the above court in the cause of *Davies v. Holbrook*, dated the 5th of November, 1850, are as follow: Two horses, two collars, and two bridles, which were seized in a stable at Bagley, in the parish of Hordley, in the county of Salop, on the 31st of October, 1850. The ground of our claim to the said two horses, two collars, and two bridles is, that they were assigned to us by an indenture, dated the 28th of May, 1850, and made between Thomas Holbrook, (defendant in the said cause,) of the one part, and ourselves of the other part. Dated the 11th of November, 1850.

(Signed) “GEO. HARPER.
“R. PARRY JONES.”

The judge of the County Court, being of opinion that the ground of claim was not sufficiently stated, refused to proceed upon it; but held, without hearing the parties, that the goods belonged to the execution debtor at the time of the execution.

Peacock showed cause on behalf of the judge of the County Court.

This claim arose under the 118th section of the 9 & 10 Vict. c. 95, and the main point is, whether the notice of claim was sufficient. By the 39th rule of practice framed for county courts, "the claimant shall, five clear days before the day on which the summonses are returnable, deliver to the officer charged with the execution of the process, or leave at the office of the clerk of the court, a particular of any goods or chattels alleged to be the property of the claimant, and the grounds of his claim." This notice is defective, in not stating any consideration for the deed; it may have been merely a voluntary deed, or a post-nuptial settlement, void as against creditors. It should have been shown to have been valid as against them. The mere production of the deed at the trial would not be sufficient.

[Coleridge, J. *Prima facie*, a deed imports consideration. The rule does not call upon the claimant to show a valid ground of claim. Your contention is, that a man must make out a good case on the face of his notice.]

The decision in *Ex parte Tanner*, 19 L. J., Q. B., 318, is applicable. There the notice was in these words: "*Cullum v. Ross*. I, the undersigned Thomas Tanner, hereby give notice, that the several goods and chattels, hereunder written, and taken by you under a warrant of execution awarded and issued in the above-named cause, are, and every one of such goods and chattels so hereunder written were, at the times of your taking the same, my property, and not the property of the above-named defendant, Ross." The notice then set out an inventory of the goods claimed. The judge of the Lambeth County Court having held this notice to be insufficient, a rule for a *mandamus*, commanding him to proceed upon the interpleader summonses, and to hear and determine the merits of the claim, was discharged by the full Court of Queen's Bench. Lord Campbell, C. J., on that occasion, stated that the object in framing the rule was "to enable the execution creditor to meet fraudulent attacks, by giving him the means of knowing whether the claim was well founded or not;" and Patteson, J., said, "This is analogous to interpleader summonses in the superior courts, in which we always require the claimant to state how he claims the goods."

[Coleridge, J. In that case no ground of claim was stated, but the claim itself was merely repeated. Here it is said to be under a deed.]

Lush showed cause on behalf of the execution creditor. Even admitting that the notice was sufficient, yet another question is, whether this court can interfere in the manner proposed. The creditor has taken goods under an execution, and has afterwards sold them under the adjudication of a competent tribunal, and the only one to which he could have recourse. Is a person to be allowed to come at any distance of time to render all these proceedings nugatory? It is for the county court judge alone to decide upon the sufficiency of a notice, and there is no appeal from his decision. The stat. 9 & 10 Vict. c. 95, under which these proceedings took place, gives no appeal whatever. Suppose, under sect. 76, the judge were to

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decide that a special defence was excluded, upon the ground that no proper notice thereof had been given, would this court review his decision?

[Coleridge, J. This is not an appeal from an adjudication of the judge; but the complaint is, that he has refused to adjudicate upon the claim before him, although the statute requires him to do so. It is like the ordinary case of a *mandamus* issuing to quarter sessions when they refuse to adjudicate. No appeal is given to us in that case, but it is for us to see that the sessions do arrive at a decision.]

The notice was insufficient. The parties should have reasonable opportunities of information afforded to them. At the hearing, the claimant would not be permitted to go into any matter not stated in the grounds of his claim; and if evidence of this statement alone would not be sufficient, that is a proof that the statement itself is bad.

T. Jones, in support of the rule, was not called upon.

COLERIDGE, J. This rule must be made absolute. There is a well-known distinction between interfering with proceedings in inferior tribunals, where the judge has abstained from entering on a consideration of the case in consequence of a wrong decision upon some preliminary matter, and where he has actually heard and decided the question. Has there been an adjudication upon the merits in this case? There was no inquiry into the validity of the transfer to the claimants, but their claim was refused to be heard because of the insufficiency of the notice. The case, is, therefore, brought within the jurisdiction of this court, and it does not resemble an appeal from the decision of the judge. The notice in this case was sufficient. Some confusion has arisen from its being supposed that the ground mentioned must be a valid one. That is not so; the most faithful account of the transaction may be that which shows its invalidity, and yet that would be a ground of claim within the rule. In *Ex parte Tanner*, the notice amounted to this — I claim because I do claim; here, it is — we claim because the property was assigned to us by deed. That deed may be fraudulent as against creditors, yet they say it is our claim.

Rule absolute.

Regina, on the Prosecution of Hughes, v. Lechmere.

REGINA, on the Prosecution of W. S. P. HUGHES, v. SIR E. H. LECHMERE, BART.¹

Hilary Term, January 18, 1851.

Coroner — 7 & 8 Vict. c. 92 — Division of County into Districts — Compensation.

The 7 & 8 Vict. c. 92, enables the queen by order in council to direct that any county shall be divided into districts, to each of which a separate coroner is to be appointed; and by section 6, where "any such county has been customarily divided into districts for the purpose of holding inquests during seven years before the passing of the act, and it shall seem expedient to her majesty that the same division of the county be made under the act, each of such districts shall be assigned to the coroner usually acting in and for the same district; but if it shall appear expedient to her majesty that a different division of such county be made, and any coroner shall present a petition praying for compensation for the loss of his emoluments arising out of such change, her majesty may direct the lords of the treasury to assess the amount of such compensation: "—

Held, that the power to direct compensation to be assessed extended only to those cases where a county had been customarily divided into districts for seven years before the passing of the act, and where a different division is ordered under the act.

MANDAMUS. The writ, after reciting the 7 & 8 Vict. c. 92, s. 2, 3, 4, 5, 6, stated that the justices of the county of Worcester in quarter sessions assembled, on, &c., having deemed it expedient that the said county should be divided for the purposes of the said act into three districts, presented a petition to the queen in privy council for an order under the said act that such division might be made, &c. And by an order in council, dated the 19th of December, 1846, the said county was divided into districts pursuant to the said petition. That W. S. P. Hughes for several years last past, and before the passing of the said act, had been and was elected one of the coroners of the said county of Worcester; and that he had ever since election exercised the duties of such office. That before and at the time of the sustaining of the damage, &c., thereafter mentioned, the said W. S. P. Hughes was in the possession or receipt of certain fees and emoluments arising out of such his office of coroner of the county of Worcester, and of right due and payable in respect thereof. That the said W. S. P. Hughes having received notice of such petition of the said justices, on the 13th of May, 1845, presented a petition to the queen in council, setting forth that by such division a great change would be effected in the duties to be performed by him, and great loss would accrue to him thereby; and praying, that if it should appear expedient that the proposed division in the said county should be made, the queen would be pleased to grant to him such compensation for the loss of his emoluments arising from the proposed change as her majesty should think fit, &c. That on the 5th of March, 1847, the said justices, in quarter sessions assembled, assigned the middle district of the said county to the said W. S. P. Hughes. That by an order, made by the queen in privy council, dated the 29th of February, 1847, it was ordered and directed that the commissioners of her

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majesty's treasury should assess the amount of compensation which it should appear to them ought to be awarded to the said W. S. P. Hughes; and further, that the amount of such compensation when assessed should be paid by the treasurer of the said county to him, out of the county rate of the said county. That thereupon the said W. S. P. Hughes was required by the said commissioners to lay before them certain evidence, returns and accounts of fees of his office of coroner, to enable them to assess and determine the amount of compensation that should be awarded to him; and thereupon the said W. S. P. Hughes did furnish such evidence, returns and accounts as were so required by him. That by an order or assessment, under the hands of three of the lords commissioners of the treasury, made in pursuance and under the authority of the said act of Parliament, and bearing date the 17th of July, 1847, the said lords commissioners did assess the amount of compensation which it appeared to them ought to be awarded to the said W. S. P. Hughes, at the sum of 55*l.* per annum, to commence from the time when the order in council of the 19th of December, 1846, came into operation, and to continue until further directions; and which said order was transmitted to the then treasurer of the said county of Worcester, who made four quarterly payments of such compensation or annuity so ordered to be paid to the said W. S. P. Hughes, and no more. That the defendant, who was treasurer of the said county, had wholly neglected and refused to pay to the said W. S. P. Hughes seven quarterly payments of the said compensation or annuity so ordered to be paid to him as aforesaid, &c. The writ then commanded the defendant to pay out of the county rates of the said county 96*l.* 5*s.*, being the sum so due and in arrear, to the said W. S. P. Hughes, in respect of the said compensation or annuity.

The return certified that it was not set forth in the said order in council of the 19th of December, 1846, neither did it appear to her majesty, with the advice of her privy council, that the county of Worcester had been customarily divided into districts for the purpose of holding inquests, during the space of seven years before the passing of the act in the writ mentioned. And that the said county had not been customarily divided into districts for the purpose of holding inquests during the space of seven years before the passing of the said act, nor was the said county at any time divided into such districts prior to the division made in pursuance of the said order in council. And that he had refused to pay to the said W. S. P. Hughes the said sum in respect of the said compensation, because of the matters and things in this return mentioned.

Demurrer and joinder in demurrer.

The case was now argued by

Welsby, for the prosecutor. The act of 7 & 8 Vict. c. 92, provides, by sect. 2, for the division of a county into districts where no such division had before existed, or for alterations in existing divisions, and it contemplates that any coroner who is injured by the proposed new division of the county may petition the queen in council previous to the order in council being made; and sect. 6 empowers her majesty

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to direct the lords of the treasury to assess compensation in respect of a loss of emolument consequent upon the new division of the county. That section provides, that if it shall appear "that any such county has been customarily divided into districts for the purpose of holding inquests during the space of seven years before the passing of the act," and the same division of the county is sanctioned by the queen in council, each of such districts is to be assigned to the coroner usually acting therein. In that case no existing right is affected, and no compensation could be claimed. But if it shall appear expedient "that a *different* division of such county be made," and any coroner shall present a petition praying for compensation for the loss of emoluments arising out of such change, in that case such compensation may be awarded. The words used in that part of the clause refer to a state of things contrary to what had gone before, viz., to a case where a county had not been customarily divided into districts. The defendant will argue that a different division implies that some division existed at the time of the order made, but that is not so; the scope of the clause is to give compensation wherever existing rights are affected by a division of the county being made. It cannot be supposed that the legislature intended wholly to omit the case of a county divided for the first time, when the emoluments of the coroner would be most seriously affected by such a change.

[*Lord Campbell, C. J.* There would be great difficulty in ascertaining the proper amount of compensation in such a case.]

Here the lords of the treasury have assessed it, and therefore no argument as to difficulty can arise. It is admitted by the return that Mr. Hughes received certain fees, and has suffered a loss by the change; it may be, that although the county was not customarily divided, the different coroners may have by mutual agreement confined themselves to particular districts, and so the same injury would have, in effect, been produced.

[*Coleridge, J.* If the queen, instead of dividing the county into districts, chose to issue a writ to elect more coroners, there would be no compensation.]

Such a step would not be taken without inquiry, so as to avoid doing injustice to the existing coroners.

Alexander was not called upon to support the return.

LORD CAMPBELL, C. J. The prosecutor's counsel has said all that can be said in his favor; but I am of opinion that the construction which he contends for cannot be maintained. I should have been glad if I could have supported it, because where there is any improvement in the administration of justice, it is requisite that persons injured by the alterations should be compensated. But we have no power given us to do so here. It seems by the act that the remedy is confined to cases where there was a separate division of the county before her majesty had altered the districts. If there has been no previous division, the statute does not apply. It must be a change of *such* districts. Here it is allowed that there never were any

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separate districts existing previously to the order in council, and consequently we have no authority to interfere.

COLERIDGE, J.¹ It is very possible that this may be a *casus omissus*, as it might be said is also the case of the queen directing another coroner to be elected. One case is contemplated throughout, and that is, where a county has been customarily divided into districts. That is subject to two provisions; either the old divisions may be sanctioned, or new ones may be erected. The case of a county which was never customarily so divided is not within the statute.

WIGHTMAN, J. The statute is limited to cases where there is a change of previous divisions. It is not necessary to inquire whether the omission of a case like the present was by design or accident.

Judgment for the defendant.

HAY v. AYLING.²

Hilary Term, January 22, 1851.

Bills of Exchange — Gaming — Illegality — Evidence — Pleading.

To an action against the acceptor of a bill of exchange, drawn by the plaintiff, the defendant pleaded that a bet was lost by the defendant to A B, and that the said bill of exchange was, at the request of A B, given and accepted by the defendant in consideration of the said bet, and to secure payment thereof, contrary to the statute, &c., and that there never was any other consideration for the acceptance of the said bill, and that the plaintiff, at the time when he drew and the defendant accepted the same, had notice of the premises. The evidence was that the defendant had accepted a prior bill drawn by the plaintiff in consideration of the bet lost to A B, and that the bill sued upon was given in renewal of that prior bill. The jury found that the bill declared upon was given in consideration of the bet, and that the plaintiff had notice of it:—

Held, that the plea was proved:—

Held, also, that the plea was a good answer to the action under the 5 & 6 Will. 4, c. 41.

[*Boulton v. Coghlan*, 1 Bing. N. C. 640, approved.—Ed.]

ASSUMPSIT against the defendant, as acceptor of two bills of exchange for 50*l.* each, drawn by the plaintiff, on the 7th of July, 1848, and payable to his order four months and six months after date respectively.

Plea (amongst others) that before the acceptance of the said bills of exchange, or either of them, to wit, on, &c., certain persons whose names were to the defendant unknown, were about to game at a certain game, to wit, a game of horse racing, by racing divers horses, to wit, a horse named Surplice, and divers other horses, and the defendant then betted 100*l.* against 10*l.* with J. D. Arbutnot, that one of the persons, whose name is to the defendant unknown, who

¹ PATTESON, J., was sitting in the Court for Crown Cases Reserved.

² 20 Law J. Rep. (N. S.) Q. B. 171.

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were about to game the said game, would not win the said game with the said horse named Surplice, and the said J. D. A. then betted 10*l.* against 100*l.* with the defendant that the said person would win the said game with the said horse; that the said game was afterwards, and before the acceptance of either of the said bills, gamed, and the said person then won the said game with the said horse named Surplice, and the said J. D. A. then, by betting on the side of the said person, won of the defendant the said sum of 100*l.* so betted as aforesaid, and the said bills of exchange were afterwards, to wit, on, &c., at the request of the said J. D. A., given and accepted by the defendant in consideration of the said sum of 100*l.* so won by betting as aforesaid, and to secure the payment thereof, contrary to the form of the statute, &c. And that there never was any other value or consideration for the acceptance of the said bills or either of them, or for the payment by the defendant of the amount thereof, or of any part thereof, and that the plaintiff before and at the several times when he made the said several bills, and when the defendant accepted the same, had notice of the premises in this plea aforesaid, and took the said bills of the defendant with such notice.

Replication *de injuria*, and issue thereon.

At the trial, before Erle, J., at the Sittings at Westminster, in Hilary term, 1850, it appeared that the defendant kept a betting list containing the odds against the horses who were to run for the Derby, and that any person who wished to back any horse paid a sum down and received a ticket entitling him to receive the odds in case that horse won the race. It was proved that a few days after the race was run, the plaintiff produced a ticket and applied to the defendant for payment of 100*l.* on behalf of a Mr. Arbuthnot, on account of a bet of ten to one lost by the defendant to Arbuthnot upon a horse named Surplice who had won the race. The defendant did not then pay the money, but accepted a bill of exchange for 100*l.* drawn, on the 3d of June, 1848, upon him by the plaintiff, payable at one month after date. This bill was not paid at maturity by the defendant, who then accepted the two bills in the declaration mentioned by way of renewal of the former bill. In order to prove his plea, the defendant gave in evidence a notice served by the plaintiff to produce any books containing entries of the receipt of money relating to the race, and particularly the entry, &c., of the sum of 10*l.* received from J. D. Arbuthnot by the defendant in respect of the horse Surplice, and all betting lists, &c., "relating to the aforesaid bet between the defendant and the said J. D. Arbuthnot."

For the plaintiff, it was insisted that no bet between Arbuthnot and the defendant was proved, nor was there any evidence that the bills declared upon were given for any bet, but that they were in renewal of the former bill, and that the plea was not proved, and *Boulton v. Coghlan*, 1 Bing. N. C. 640; s. c. 4 Law J. Rep. (n. s.) C. P. 172, was cited. The learned judge thought there was some evidence of the first bill being accepted for the bet, and thought that if that were so the illegality vitiated the renewed bills also, but reserved to the plaintiff leave to move to enter the verdict if the court should be of

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opinion that there was no evidence to support the plea. The defendant also had leave to apply to the court to amend the plea by stating the transaction at length, if it should be thought necessary and allowable to do so. The jury found that the bet was the consideration for the bills of exchange declared upon, and gave their verdict for the defendant. The plaintiff having afterwards obtained a rule nisi to enter the verdict, or for a new trial on the ground of misdirection, or for judgment *non obstante veredicto*,—

Montagu Chambers and *Keane* showed cause.¹ There is no misdirection, as there was evidence on which the jury might find, as they did, that the consideration for the bills declared upon was the bet between Arbutnot and the defendant. The plaintiff clearly took the first bill as Arbutnot's agent; and although the renewed bills may have been accepted by the defendant partly in consideration of the plaintiff's forbearance to sue on the original bill, yet if the gaming formed any part of the consideration, that would be an answer to the action, and the plea would be supported. *Boulton v. Coghlan* is different; there the plaintiff in the action was no party to the first note, and the jury found that he was ignorant of the gambling transaction upon which it was founded, and that he gave a good consideration for the note sued upon. That case also arose under the statute of the 9 Anne, c. 14, which rendered securities given for gaming absolutely void, whereas by the 5 & 6 Will. 4, c. 41, which applies to the present case, such securities are now to be considered as taken for an illegal consideration, and it is necessary to affect the plaintiff with notice of the illegality, which was done here. But, at all events, if necessary, the plea may be amended by setting out the whole transaction. No material alteration would be thereby made, as no new parties would be introduced, and the effect of the plea as amended would be substantially the same as at present. *David v. Preece*, 5 Q. B. Rep. 440; s. c. 13 Law J. Rep. (N. S.) Q. B. 88, does not apply.

Watson and *Edwin James*, in support of the rule. It is quite consistent with this plea that the plaintiff has a good cause of action according to the facts proved. If he had taken the original bill without notice then of the gaming transaction, and had afterwards taken the bills declared on in renewal of that bill, he might well sue upon them. The plea only alleges that he had notice of the illegality when he took the renewed bills. If the plea had alleged that the original bill was accepted for the gaming debt, and that the plaintiff had taken it with notice, it would have been a good answer. There is no real difference between this case and *Boulton v. Coghlan*, where it was held necessary to set out the prior bill, because the plea did not state the real defence which existed; indeed, the whole transaction being there absolutely void, there was less reason than there is here for stating the real facts. Then, as to the proposed amendment, *David v. Preece* is very strong to show that it cannot be made where

¹ January 16, before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and ERLE, JJ.

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its effect would be, not to correct a variance, but to set up a totally different ground of defence. Then, the plea is no answer to the action, as securities given in consideration of gaming are not rendered void by the 8 & 9 Vict. c. 109.

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. We are of opinion that the verdict for the defendant on his last plea ought not to be disturbed, as all the material allegations in this plea were proved. The plaintiff's counsel rested their objection on the authority of *Boulton v. Coghlan*. We entirely approve of that decision. There the plea, after stating the loss of the money at play, went on to allege, that the said money being so lost, it was agreed between the defendant and Aldridge that the payment thereof should be secured by the promissory note of the defendant, and that in pursuance of that agreement the defendant made the promissory note on which the action was brought. The replication denied that the promissory note was made by the defendant in pursuance of the alleged agreement. The evidence was, that the defendant, having lost the money to Aldridge at hazard, accepted and gave him a bill of exchange for the amount on the 23d of July, 1833; that Aldridge then indorsed this bill to Knight; that in the month of December following the defendant requested Knight to take a promissory note at six months' date, as a substitution for the bill; that, Knight consenting, the promissory note on which the action was brought was made and delivered to him, and that Knight indorsed this note to the plaintiff. Lord Chief Justice Tindal and the other judges of the Common Pleas very properly held, that the plea was not proved, for the note had not been made in pursuance of the agreement stated in the plea, but in pursuance of another agreement between other parties. In the present case, however, the plea, after stating the loss of the 100*l.*, goes on to allege, "that the two bills of exchange on which the action is brought were given and accepted by the defendant in consideration of the said sum of 100*l.* so lost by betting as aforesaid, and to secure the payment thereof." The replication of *de injuria* put the whole plea in issue; but this allegation was proved. The two bills were given in consideration of the 100*l.* so lost by betting, and to secure the payment thereof. This was, at all events, part of the consideration. The plea adds, that there was no other consideration for the acceptances; but this is an unnecessary allegation, not requiring to be proved; and if we are to understand that forbearance to sue upon the first bill for 100*l.* was likewise a consideration for the acceptances, the plea is not disproved, and is still a bar to the action, as the bills on which the action is brought are tainted and nullified if any part of the consideration was illegal. As the law *now* stands, the illegality of the gaming consideration would be immaterial to a *bona fide* holder without notice of the consideration; but the plea goes on to allege (what was distinctly proved) "that the plaintiff, before and at the several times when the bills were made and accepted, had notice of the premises aforesaid, and took

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the said bills from the defendant with the said notice." We have, therefore, come to the conclusion, that in this case there is neither deficiency of proof nor variance, and that the application to amend the plea is unnecessary. An exception was taken to the validity of the plea, on the ground that the stat. 8 & 9 Vict. c. 109, s. 18, does not expressly avoid securities given for a gaming debt; but the stat. 5 & 6 Will. 4, c. 41, s. 1, does enact that such securities shall be deemed to have been made for an illegal consideration, and they are, therefore, void, except in the hands of a *bona fide* holder without notice. The rule must, therefore, be discharged. *Rule discharged.*¹

THE GOVERNOR AND COMPANY OF COPPER MINERS v. FOX & others.²

Hilary Term, January 22, 1851.

Corporation — Contract not under Seal — Charter — Estoppel.

In an action of *assumpsit*, the declaration stated, that in consideration that the plaintiffs would sell to the defendants iron rails, the defendants agreed to furnish to the plaintiffs sections of the said railways, averring mutual promises, and alleging as a breach the non-delivery of the sections by the defendants. It appeared that the plaintiffs were incorporated by a charter, for the purpose of carrying on the business of copper miners, and that the contract in question, which was not under seal, had been made by an agent on behalf of the plaintiffs with the defendants:—

Held, that the action could not be maintained by the corporation, as the contract was not under seal, and did not fall within any of the exceptions to the general rule, that a corporation can only bind itself by deed.

¹ In this country it is held, in accordance with the English decisions under the statute 9 Anne, c. 14, that where a statute has expressly declared a promissory note *absolutely void*, as is often the case in regard to notes given for usury and for gaming, such note may be impeached by the maker, even in the hands of a *bona fide* holder, who took it in the due course of business, before its maturity, and for a valuable consideration, without notice of the defect. *Bridge v. Hubbard*, 15 Massachusetts, 96, (1818.) *Saurwein v. Brunner*, 1 Harris & Gill, 477, (1827.) *Farris v. King*, 1 Stewart, 255, (1827.) *Lucas v. Waul*, 12 Smedes & Marshall, 157, (1849.) 3 Kent's Com. 5 Ed. pp. 79, 80. Story on Notes, sec. 192. For wherever a note is made entirely void by statute, it is so in the hands of an innocent indorsee. *Root v. Godard*, 3 McLean, 102, (1842.) But it is otherwise if the note is not expressly declared void, but is only voidable between the original parties by reason of illegality

or fraud. In such case, if a *bona fide* indorsee take it without notice, the maker cannot impeach it in his hands. *Clark v. Ricker*, 14 New Hampshire, 44, (1843.) *Rockwell v. Charles*, 2 Hill, 499, (1842.) *City Bank v. Barnard*, 1 Hall, 70, (1828.) *Vallett v. Parker*, 6 Wendell, 615, (1831.) *Early v. McCart*, 2 Dana, 414, (1834.) *Holeman v. Hobson*, 8 Humphreys, 127, (1847.) *Adams v. Wooldridge*, 3 Scammon, 255, (1841.) *Creed v. Stevens*, 4 Wharton, 223, (1839.) *Gould v. Armstrong*, 2 Hall, 266, (1829.) But *contra*, if he have such knowledge, when he takes the paper, although he gives value for it. *Proctor v. McCall*, 2 Bailey, 298, (1831.)

It is equally well settled that a promissory note given in renewal of a note, which was void for want of consideration or illegality, is itself invalid. *Hill v. Buckminster*, 5 Pickering, 391, (1827.) *Bridge v. Hubbard*, *supra*. *Commonwealth Ins. Co. v. Whitney*, 1 Metcalf, 21, (1840.)

² 20 Law J. Rep. (N. S.) Q. B. 174.

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That the contract was not incidental or ancillary to carrying on the business of copper miners, and was therefore not binding on the corporation.

That no other charter authorizing the company to deal in iron could be presumed to exist, the charter which was given in evidence not supporting such an authority.

That, as the corporation could not be sued upon this contract, and as the alleged promise by them formed the consideration for the defendants' promise, the corporation could not sue upon the contract.

Semble, that the doctrine cannot be supported, that a corporation may sue as plaintiffs upon a simple contract, upon the ground that by so doing they are estopped from objecting that the contract was not binding upon them. At all events, such an estoppel could only support an action of covenant, as upon a contract under seal.

ASSUMPSIT. The declaration stated, in substance, that in consideration that the plaintiffs would sell to the defendants 2000 iron rails, the defendants agreed to furnish to the plaintiffs sections of the said rails in April, 1847, averring mutual promises, and alleged as a breach that the defendants did not deliver to the plaintiffs sections of the said rails according to their promise.

Plea — Not guilty.

At the trial before Coleridge, J., at the sittings at Guildhall, after Hilary term, 1850, it appeared that the plaintiffs were incorporated by letters patent of the 3 W. & M. 1691, which, after reciting that "great quantities of copper ore are found in divers parts of this our kingdom, which for want of skilful artists to refine and purify the same is totally neglected and unimproved," and also the petition of certain persons, setting forth "that they had found out several furnaces, engines, and other ways, methods, and inventions for the more easy and effectual melting down, refining, and purifying the same," and praying that they might be incorporated "to manage and carry on the same," incorporated the several persons therein specified and their successors, by the name of "The Governor and Company of Copper Miners in England," for the purposes aforesaid; and declared that they should at all times thereafter "be able and capable in law to have, purchase, possess, enjoy and retain lands, mines, mills, houses, rents, privileges, liberties, franchises, and hereditaments of what nature, kind, and quality soever;" and they might have "a common seal for the expedition of the business and affairs of the said company."

The contract in question, which was entered into by an agent for the company, was as follows: "London, October 19, 1846. Bought, for account of Messrs. Fox, Henderson, & Co., of the governor and company of copper miners in England, 2000 good merchantable iron rails, of sellers' make, of ordinary double-headed section or sections, (not more than two,) but not a T or bridge rail, and to weigh from 65 to 85 pounds per yard in buyers' option, at 19l. 15s. per ton, delivered free on board at Port Talbot in Wales. Section or sections to be handed to sellers in April, 1847, and delivery to commence in June, 1847, and to be proceeded with at the rate of 300 tons per month until the contract is completed." Sections for a portion of the rails had been sent by the defendants to the plaintiffs. The action was brought to recover damages for the breach of contract in respect of the residue.

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For the defendants, it was objected that the action could not be maintained on two grounds. First, that as the contract was executory and not under seal, the plaintiffs, being a corporation, could not sue upon it. Secondly, that the contract sued upon was not incidental to the purposes for which the plaintiffs were incorporated, and therefore was not excepted from the general rule requiring it to be under seal. The learned judge thought the action might be supported, and the plaintiffs had a verdict for 521*l.* 5*s.*

A rule *nisi* for a new trial, on the ground of misdirection, having been obtained, —

Crowder and Montague Smith showed cause.¹ First, as to the contract being executory. It is not wholly so, but has been executed in part, and may therefore be sued upon. But the distinction between executory and executed contracts entered into by a corporation is now exploded, so far as rendering valid contracts incidental or necessary to the business of the corporation. *Church v. The Imperial Gas Light and Coke Company*, 6 Ad. & E. 846; s. c. 7 Law J. Rep. (N. S.) Q. B. 118. If this, then, had been a contract for the supply of copper, there could be no doubt it might be sued upon; and, upon the facts proved at the trial, it cannot be assumed that the plaintiffs have not a right to trade in iron. This contract may be incidental to carrying on the business of the incorporation, under the charter of William and Mary. The company may hold lands and mines, and dealing in iron may be ancillary to their doing so.

[*Lord Campbell*, C. J. Can we, when one purpose of the corporation is proved, presume another? It lies on you to show affirmatively that this contract, though not under seal, is valid.]

The conduct of the defendants admits that the plaintiffs are, in fact, dealing in iron; and as there is no plea of illegality on the record, it must be taken as against these defendants that the plaintiffs were trading legally. Again, where a company has carried on a particular trade for a great length of time, as these plaintiffs have carried on the trade of dealing in iron, it must be presumed that they have done so properly; and, if necessary, a charter authorizing them to carry on such a business will be presumed to exist. There was sufficient evidence here upon which the jury might be directed to presume such a charter. But, secondly, supposing this contract not to be an exception to the general rule requiring a contract by a corporation to be under seal, no case has yet decided that such an objection can prevail against a corporation suing as plaintiffs. *The Mayor, &c., of Ludlow v. Charlton*, 6 Mee. & W. 815; s. c. 10 Law J. Rep. (N. S.) Exch. 75, turned upon the right of the defendant to set off a sum under a contract made by the corporation; therefore the corporation was not there seeking to enforce the contract. In *The Mayor, &c., of Stafford v. Till*, 4 Bing. 75; s. c. 5 Law J. Rep. C. P. 77, a corporation was allowed to sue on a contract not under seal.

¹ January 13, before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and WIGHTMAN, JJ.

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[*Patteson, J.*, referred to *The East London Waterworks Company v. Bailey*, 4 Bing. 283; s. c. 5 Law J. Rep. C. P. 175.]

That is the only case in which such an objection appears to have been raised. There is no greater difficulty than arises under the Statute of Frauds, where a party who has not signed the contract may sue though he cannot be sued upon it. *Laythoarp v. Bryant*, 2 Bing. N. C. 735; s. c. 5 Law J. Rep. (N. S.) C. P. 217. So here the defendants are bound by the contract, and may be sued upon it, although the plaintiffs cannot. If the sold note were sealed, the plaintiffs would be undoubtedly liable to be sued or liable to sue. Part performance of the contract has the same effect in binding the plaintiffs. The contract also being by an agent is ratified by the plaintiffs suing upon it. According to what is said by Tindal, C. J., in *The Fishmongers Company v. Robertson*, 6 Sc. N. R. 56; s. c. 12 Law J. Rep. (N. S.) C. P. 185, the suing on the contract amounts to an admission on the record by the plaintiffs, that the contract was duly entered into by them, so as to be obligatory on themselves; and such admission would estop the plaintiffs from setting up as an objection in a cross action that it was not sealed with their common seal.

[*Patteson, J.* The effect of such a doctrine would be, that a person who has a cross demand against a company upon a contract not under seal must defend an action brought against him by the company in order to get in his cross demand.

Lord Campbell, C. J. This is, on the face of it, a mutual contract; and if the plaintiffs have not promised, how can the defendants have done so?]

In *The East India Company v. Glover*, 1 Str. 612, which was an assumpsit by a corporation on an executory contract, the objection that it was not under seal was not taken.

Sir F. Thesiger, Peacock, and Prentice, in support of the rule. The present contract is not executed, neither is it within the scope of the business for which the company is incorporated; therefore it is not valid, because not under seal. The exceptions to the general rule of law, by which a corporation can bind itself only by deed, are stated in *Arnold v. The Mayor, &c., of Poole*, 5 Sc. N. R. 741; s. c. 12 Law J. Rep. (N. S.) C. P. 97. *The Mayor, &c., of Ludlow v. Charlton*, and *Paine v. The Guardians of the Strand Union*, 8 Q. B. Rep. 326; s. c. 15 Law J. Rep. (N. S.) M. C. 89. In *Lamprell v. The Billericay Union*, 3 Exch. Rep. 283; s. c. 18 Law J. Rep. (N. S.) Exch. 282; and *Diggle v. The London and Blackwall Railway Company*, 19 Law J. Rep. (N. S.) Exch. 308, an action was held not to be maintainable even upon an executed contract, which did not fall within the exceptions to the general rule. But it is said that, according to a suggestion thrown out in *The Fishmongers Company v. Robertson*, the plaintiffs may sue, though they could not have been sued, on the contract; but if, as must be admitted, the plaintiffs were not originally bound by this unsealed agreement, there can be no mutuality proved. It is necessary for the plaintiffs to make out that they agreed to sell as the consideration for the defendants' promise. The

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question is, whether there is a cause of action when the suit is commenced, not whether one may afterwards exist. What is said about an estoppel cannot be supported, for the same reason, that it is not mutual; at all events, if there is an estoppel on the plaintiffs, it must bind them to a contract under seal; and so the action should be in covenant, not in *assumpsit*. The analogy to the cases under the Statute of Frauds does not hold. There the statute assumes the existence of an agreement, but prevents an action being brought on it unless it is signed. Here, no agreement can exist except under seal. Then it is said that bringing the action is a sufficient ratification by the plaintiffs of their agent's act. But that is not so; no ratification can be binding on a corporation except it be under seal. *Bac. Abr. tit. "Corporation."*

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. We are of opinion that, in this case, the rule should be made absolute. The objection relied upon by the defendants, if well founded, may clearly be taken advantage of under the plea of *non assumpsit*. If the contract given in evidence is void, the defendants did not promise in manner and form, and no special plea could be necessary.

Let us inquire whether the plaintiffs could have been sued on this contract for not delivering the iron rails. The general rule being that a corporation can only bind itself by deed, the simple contract on which it is to be held liable must be brought within some of the exceptions to the rule. But this is not such a small matter as a corporation may contract for without deed; and the cases respecting executed contracts are here wholly inapplicable. The only ground on which the validity of the contract has been rested is, that this must be taken to be a trading company, which, under its chartered constitution, may deal in iron rails. But the charter of 3 Will & M., by which the corporation was created, was in evidence; and this charter is expressly confined to dealing in copper. It contains some general words about "lands, mines, mills, and houses," but these all have reference to the "copper ore" mentioned in the preamble to the charter, and the company is only authorized to manage and carry on the business and affairs belonging to copper miners. Had the subject matter of this contract been copper, or if it had been shown in any way to be incidental or ancillary to carrying on the business of copper miners, the contract would have been binding although not under seal; for where a trading company is created by a charter, while acting within the scope of the charter it may enter into the commercial contracts usual in such a business in the usual manner. But the iron rails, the subject matter of this contract, were not shown to have any connection with the business of copper miners; and, indeed, it was admitted in argument that the plaintiffs have ceased to be copper miners, and now only deal in iron. It was contended that some other charter is to be presumed, which would authorize this dealing in iron; but the charter creating the company as a

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corporation being given in evidence, and no other charter appearing, we are not at liberty to presume that any other exists. It is unnecessary for us to consider whether the company could sue or be sued in this case, even if the contract had been by deed. The contract is by parol only, and as the company could not have been sued, the question is, Can they sue upon it? By the Statute of Frauds, no action can be brought upon certain agreements unless there be a memorandum thereof signed by the party to be charged; and the courts have very properly held that a party who has signed a memorandum of the agreement may be sued upon it, although the other party has not, because there the requisition of the statute has been complied with, and there is such an agreement as the party suing alleges. But here the consideration for the defendants' promise is an alleged promise by the plaintiffs, and their supposed promise given in evidence being void, the contract alleged is not proved. It would, indeed, be strange if a corporation entering into a commercial contract might enforce it at pleasure, but might break it with impunity, wherever fraudulently induced to do so.

The plaintiffs finally rely upon a suggestion of Tindal, C. J., in *The Fishmongers Company v. Robertson*, that when a corporation have sued as plaintiffs upon a simple contract, they may possibly forever be estopped from objecting that the contract was not binding upon them, so as to afford a remedy to the other side by cross action, and to take away the objection of want of reciprocity; but there is great difficulty in saying what shall be the form of action to which the opposite side may resort, or from what point of time the estoppel is to operate; and after all it would only give a remedy upon the contract where the corporation have deemed it for their advantage to enforce it by action; the other side being left without remedy where the corporation wish entirely to break and abandon it. Besides, giving full effect to the supposed estoppel, and supposing that hereafter the now plaintiffs might be sued in an action of covenant on this contract, the want of proof being somehow excused, still the estoppel would not prove the contract set out in this declaration, which supposes the promises on either side to be without seal. On no ground, therefore, can the action be supported.

We regret very much that any technicality should interfere with the enforcement of a fair contract, but the law by which a corporation is not bound unless the contract is under seal, can only be altered by the legislature.

*Rule absolute.*¹

¹ The old English common law rule, that a corporation aggregate could bind itself only by deed, unless expressly or impliedly authorized to contract in some other mode, although formerly adopted in this country, *Beckbill v. Turnpike Company*, 3 Dallas, 496, (1799.) *Frankfort Bank v. Anderson*, 3 A. K. Marshall, 1, (1820.) *McBean v. Irwin*, 4 Bibb, 17, (1815,) is now exploded, and it is here well settled that the acts of

a corporation evidenced by vote, written or unwritten, may be as completely binding as the most solemn acts done under the corporate seal, and that promises may as well be implied from its acts, and the acts of its agents, as in case of an individual. See *Bank of United States v. Dandridge*, 12 Wheaton, 68, (1827.) *Angell & Ames on Corporations*, ch. viii. s. 7. *Chesnut Hill Turnpike v. Rudler*, 4

 Fernley v. Branson.

COUNTY COURT APPEAL.

FERNLEY V. BRANSON.¹

Hilary Vacation, February 17, 1851.

Arbitrator — Discretionary Power over Costs of Award — Money had and received to recover exorbitant Sum paid on taking up Award.

If a submission to reference by agreement containing a clause for making it a rule of court provide that the costs of the reference and award shall be in the discretion of the arbitrator, who may award and direct by and to whom the same shall be paid, the arbitrator cannot by his award conclusively fix the amount of the costs of the award.

If, in the award, he name an exorbitant sum as costs of the award, and a party to the reference is obliged to pay such sum to obtain possession of the award, such party may recover the excess beyond what a jury may deem a reasonable compensation to the arbitrator in an action against the arbitrator for money had and received to his use.

THE following case was stated by the judge of the Manchester County Court of Lancashire, for the opinion of the Court of Queen's Bench:—

"This is an action to recover the sum of 49*l.* 19*s.* 11*d.*; the particulars of the plaintiff's demand being for money paid by the plaintiff to the defendant for or in respect of his fees and charges in and about a reference or arbitration between Thomas Merriman Coombs and

Sergeant & Rawle, 16, (1818.) *Proprietors of Canal Bridge v. Gordon*, 1 Pickering, 197, (1823.) And the rule is now somewhat relaxed in England.

As to the second point raised in this case, it is undoubtedly true that, in a contract of mutual promises, both parties must be bound at one and the same time, or neither will be. *Livingston v. Rogers*, 1 Caines, 583, (1804.) *Tucker v. Woods*, 12 Johnson, 189, (1815.) *Keep v. Hale*, Idem, 397. But it is equally true that a party without signing a written instrument may be bound by its terms, if he recognizes and adopts its stipulations. See *Marshall v. Hann*, 2 Harrison, 425, (1840.) And a contract defectively executed, or not all executed, in the ordinary sense of that word, may still be binding upon a party, his name being in it, and the contract being in his handwriting. *Noe v. Hodges*, 3 Humphreys, 162, (1842.) And if a corporation defectively execute a lease or indenture under seal, their acts under it, as the receipt of rent for instance, will estop them from denying the validity of the execution. *Doe d. Pennington v. Taniere*, 13 Jurist, 119, (1848.) In like manner in *Phelps v. Townsend*, 8 Pickering, 392, (1829,) where the defendant, by an agree-

ment signed only by himself, had placed his son as an apprentice to the plaintiffs to learn the art of printing, therein promising that his son should stay with them until he was twenty-one, &c., which the son failed to perform, and on the trial the defendant objected that the contract was void for want of mutuality, it not being signed by the plaintiffs, and that there was no obligation on the plaintiffs to do any thing which might form a consideration for the defendant's promise. But the court said, "that the acceptance of the contract by the plaintiffs, and the execution of it in part by receiving the apprentice, created an obligation on their part to maintain and instruct the defendant's son." So in this case, the corporation had accepted the contract; it had been in part executed by the defendants; the plaintiffs had received, apparently without objection, a portion of the subject matter, and on the principle of *Phelps v. Townsend*, would seem to be estopped from denying their liability. But *quære*, and see *Lees v. Whitcomb*, 3 Carrington & Payne, 260, (1828); s. c., 5 Bingham, 34; 2 Moore & Payne, 86. *Sykes v. Dixon*, 1 Perry & Davidson, 463, (1839.) *Payne v. Lees*, 3 Dowling & Ryland, 664. *Wood v. Edwards*, 19 Johnson, 205, (1821.)

¹ 20 Law J. Rep. (N. S.) Q. B. 178; 15 Jur. 354.

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James William Freshfield, directors of the Globe Insurance Company, or the said insurance company, and the above-named plaintiff.

"At the trial, before the judge, without a jury, it appeared, that by an agreement, dated the 20th day of April, 1849, made between Thomas Merriman Coombs and James William Freshfield, two of the directors of the Globe Insurance Company, of the first part, and the above-named plaintiff of the second part, after reciting that disputes and differences had arisen between the said Thomas Merriman Coombs and James William Freshfield, as such directors of the Globe Insurance Company, and the said plaintiff, and that it had been agreed to submit such disputes to arbitration, the said parties thereto did mutually promise and agree to observe and keep the award of the above-named defendant, (therein described as George Branson, of Manchester, surveyor,) a referee appointed by the said parties thereto, of the first part, and George Shorland, of Manchester, surveyor, a referee appointed by the said plaintiff, James Fernley, or their umpire; and it was thereby agreed that the costs and expenses of the submission and reference and award to be made should be in the discretion of the said arbitrators or their umpire, who might award and direct by and to whom the same should be paid. The two arbitrators duly appointed William James Tate, of Manchester, agent, to be the umpire, after which the reference was proceeded with. When the time arrived for making the award the arbitrators differed in opinion, and the umpire alone made his award. He employed Mr. John Speakman as his (the said umpire's) solicitor for that purpose. Mr. Speakman applied to the above-named defendant and the said George Shorland for the amount of their charges. Upon which the above-named defendant sent in an account of charges, amounting to 156*l.* 11*s.*, which was submitted to the said umpire, who considered the amount too much, and requested it might be reduced to 105*l.* And finally, with the defendant's concurrence, and by arrangement with him and Mr. Speakman, the charges of the said umpire and the above-named defendant and the said George Shorland were settled at 105*l.* each, to which certain incidental expenses were added, making the amount of charges to each of them as follows: To the said William James Tate, 108*l.* 9*s.* 3*d.*; to the above-named defendant, 109*l.* 6*s.*; to the said George Shorland, 107*l.* 6*s.* By direction of the said umpire, the said Mr. John Speakman, on the 30th day of July, 1849, informed the parties to the reference that the award was ready to be delivered on payment of 379*l.* 10*s.* 9*d.*, (which sum included the several amounts before mentioned as charges made by the said umpire and arbitrators, and also 34*l.* 14*s.* 9*d.* for rooms, &c., for the reference, 17*s.* 6*d.* for stationery, and 18*l.* 17*s.* 3*d.* for preparing the award.) The plaintiff, on receiving the communication from Mr. Speakman, called upon him the same day to take up the award. The plaintiff said the amount to be paid was very high, and requested Mr. Speakman to give him (the plaintiff) particulars of the charges, to which Mr. Speakman replied, he should not give particulars until the award was taken up; and, on the hearing of this case, it was admitted that arbitrators may often claim payment before delivering up the award, not only of

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their own charges, but also of the allowances to witnesses and other charges and expenses. Mr. Speakman stated that he should not have given up the award until the amount claimed was paid, but he did not communicate that to the plaintiff, nor did the plaintiff ask Mr. Speakman to give up the award without first paying the charges, but the plaintiff did ask Mr. Speakman whether he (the plaintiff) was obliged to take up the award, to which Mr. Speakman replied, 'No; but if you do not, perhaps the other side will.' The plaintiff grumbled at the amount, but finally paid the 379*l.* 10*s.* 9*d.*, without making any further protest, and took the award away. On the same day, Mr. Speakman, out of the identical money paid to him by the said plaintiff, paid the said William James Tate 108*l.* 9*s.* 3*d.*, the defendant 109*l.* 6*s.*, and the said George Shorland 107*l.* 6*s.*, the amount of their respective charges.

"The award so made by the said William James Tate, and taken up by the above-named plaintiff as aforesaid, directed that the said Thomas Merriman Coombs and James William Freshfield should pay forthwith to the above-named plaintiff the sum of 1000*l.*, and that all the costs and expenses of the said submission and reference and of the award should be borne by the said Thomas Merriman Coombs and James William Freshfield. And the said William James Tate did, by his said award, find and adjudge the amount of the said costs and expenses, other than and besides the costs and expenses incurred by and for the said Thomas Merriman Coombs and James William Freshfield, but including the costs and expenses to be paid on taking up the award by the party or parties taking up the same to be 527*l.* 7*s.* 9*d.*, which last-mentioned sum included the aforesaid sum of 379*l.* 10*s.* 9*d.*, and also 86*l.* 8*s.* for witnesses, and the above-named plaintiff's solicitor's bill for conducting the said reference, amounting to 60*l.* 19*s.*

"A copy of the award was delivered to the said Thomas Merriman Coombs and James William Freshfield, who objected to the amount of the costs, and proposed to pay the above-named plaintiff the 1000*l.* awarded without prejudice to an application to the court to set aside that part of the award relating to costs. This was agreed to, and the 1000*l.* paid to the plaintiff.

"In Michaelmas term, 1849, the agreement of reference was made a rule of the Court of Exchequer, and on the 5th of November, 1849, a rule was obtained in the last-mentioned court, calling upon the above-named plaintiff to show cause why the said award of the said William James Tate, or so much thereof as related to the sum of 527*l.* 7*s.* 9*d.* therein mentioned as alleged costs and expenses, should not be set aside, unless the above-named plaintiff and the umpire and arbitrators would consent that the amount of the said costs and expenses should be referred to one of the masters of that court to be taxed and settled, the said Thomas Merriman Coombs and James William Freshfield thereby consenting to such reference, and undertaking to pay the amount as ascertained upon such taxation. And the court directed notice of the rule to be given to the above-named plaintiff and to the said William James Tate and the above-named

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defendant and George Shorland, the arbitrators, all of whom were served with a copy of the said rule.

"Cause was shown against the rule, on Friday, the 11th day of February, 1850, by the above-named plaintiff and the said William James Tate and George Shorland, but the above-named defendant did not appear, and took no part whatever with respect to the matter, and on the said last-mentioned day the Court of Exchequer made the following rule :—

"Upon reading the rule made in this matter of the 5th day of November last, and hearing Mr. Watson of counsel for the above-named plaintiff, James Fernley, Mr. Martin, and Sir John Bayley of counsel for the above-named Thomas Merriman Coombs and James William Freshfield, and Mr. Henderson of counsel for Mr. James Tate, the umpire, and George Shorland, one of the arbitrators named in the said rule, and by consent of the said William James Tate and George Shorland, it is ordered that the award of the said William James Tate, as far as relates to the amount of the costs and expenses mentioned and referred to in the said award and rule of the 5th day of November last, be set aside, and that the amount of the said costs and expenses be referred to one of the masters of this court to be taxed and settled, the said Thomas Merriman Coombs and James William Freshfield hereby undertaking to pay what, if any thing, may be found due on such reference, and the said William James Tate and George Shorland hereby undertaking to refund to the said James Fernley or his attorney what, if any thing, may appear on such reference to have been overpaid to them or either of them on account of the said award and umpirage.

"A copy of this rule was served on the said umpire and arbitrators.

"In pursuance of the rule, one of the masters of the Court of Exchequer proceeded to tax the costs, and upon such taxation he was attended by the attorneys or agents of the said T. M. Coombs and J. W. Freshfield, and also the above-named plaintiff and the said W. J. Tate and G. Shorland; but the above-named defendant did not appear on such taxation, either personally or by his attorney or agent. On the 5th of June, 1850, the master made the following certificate: I hereby certify, that having been attended by the attorneys or agents of the parties hereto, with the exception of the arbitrator, Mr. Branson, who did not appear, and having perused the several affidavits filed herein, I have taxed the several items charged as per account annexed. Dated, June 5, 1850. T. Dax.

"The following is a copy of the account annexed, referred to in the said certificate of Master Dax, so far as relates to the arbitrators :—

Deductions.			Charges.		
£.	s.	d.	£.	s.	d.
65	4	0			
			Branson		
65	4	0			
			Shorland		
64	7	3			
			Tate		

"The judge was of opinion and found that the sum of 44*l.* 2*s.* was an ample remuneration for the services of the defendant as such

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arbitrator as aforesaid, and that he had been overpaid to the amount of 65*l.* 4*s.*

"Under these circumstances, the plaintiff sued the defendant in the County Court at Manchester, to recover 49*l.* 19*s.* 11*d.*, part of the said sum of 65*l.* 4*s.* taxed by the master of and from the defendant's charges as such arbitrators.

"On the part of the defendant, it was contended that the plaintiff ought not to recover for the following reasons: First, because an arbitrator's charges cannot be taxed as against him, except with his consent. Secondly, because the plaintiff's act in paying the money to the said Mr. Speakman, to take up the award, was an entirely voluntary one, and that the payment was made with a full knowledge of the facts and without protest. Thirdly, because there was no privity between the plaintiff and the defendant sufficient to maintain this action, inasmuch as the money was received, if at all, by the said W. J. Tate, the umpire, and not by the above-named defendant to the use of the above-named plaintiff.

"The judge was of opinion that the payment made to Mr. Speakman was not to be considered as voluntary, being made to obtain possession of the award, which the plaintiff considered of great value to him, and of which he could not otherwise obtain possession, and also that the plaintiff had good reason to apprehend and did believe that the sum demanded by Mr. Speakman included not only all the umpire's and arbitrator's charges, but all other the charges and expenses attending the reference; and that the payment was made to Mr. Speakman under that apprehension and without a full knowledge of all the facts.

"The judge was also of opinion, and found that the umpire, through Mr. Speakman, acted as the agent of the defendant in receiving the fee claimed by the defendant, and paid by the plaintiff. And, on the whole, the judge was of opinion that the plaintiff was entitled to recover back the amount claimed, and directed a verdict to be entered for that amount.

"The question for the opinion of the court was, whether upon the facts and under the circumstances hereinbefore set forth, the verdict as entered for the plaintiff was right.

"If the court should be of that opinion, then the verdict is to stand; but if the court should not be of that opinion, then the verdict under their direction is to be set aside, and the plaintiff nonsuited."

Cowling, for the appellant, the defendant below. The first question is, whether the plaintiff could have recovered back the money immediately after he had paid it. The second is, assuming that he could not, whether the subsequent circumstances have given him any right to maintain this action. The submission, it is contended, gave the arbitrators and umpire, respectively, power over the costs. The amount of the costs was referred to them by the parties, and the decision of the award as to the amount was conclusive. At the time the plaintiff paid the money he only paid a legal debt, for the sum as soon as it was assessed by the award became a legal debt to the umpire.

This reference was not in an action, but by agreement. It did not follow that the submission ever would be made a rule of court. It is said, that the payment was made involuntarily, and, therefore, that it may be recovered back. The case, however, does not find that the plaintiff made any complaint to the amount of the charges, or that there was a refusal to deliver up the award, unless he paid the amount. But, assuming that the payment was not voluntary, the plaintiff has no right of action. It is not in all cases that money paid under duress of goods can be recovered, but only when there is no consideration for the payment. The award was not the plaintiff's goods. Even if he may be considered as having an interest in this award, and that he could not obtain it without payment of the money, the submission to arbitration made it a duty to pay the amount, and, therefore, there was ample consideration for the payment. The umpire had a lien on the award until the amount of the costs of the umpirage were paid. *Atlee v. Backhouse*, 3 Mee. & W. 633; s. c. 7 Law J. Rep. (N. S.) Exch. 234, shows that the question is not whether the money is paid under duress of goods, but whether there was any consideration for the payment, and if there was, that it cannot be recovered back. In *Threlfall v. Fanshawe*, 19 Law J. Rep. (N. S.) Q. B. 334, it was held, that the arbitrators only acted in the discharge of their duty in assessing the amount of costs. In the cases in which Lord Kenyon said that the arbitrator could not maintain an action for his fees, the arbitrator, probably, had no power at all over the costs. Had that been the case here, the umpire, instead of having a right of action for the sum awarded as costs of the umpirage, would have been obliged to sue upon a *quantum meruit*. What has taken place since the money was paid cannot give the plaintiff any additional right of action which he had not before. The rule *nisi* which was obtained to set aside the award was not a rule to which the defendant was a party. Though he had notice of it, he was not called upon to show cause. He did not appear on the argument, or interfere in any way. Therefore, whatever the court did on that occasion cannot affect him in any way. In setting aside an award, the courts of common law act on equitable principles, for they act only in cases of references by agreement out of court, by virtue of the 9 & 10 Will. 3, c. 15, and, therefore, what the courts do in such instances cannot affect the legal rights of the parties. The award, though set aside, is not a nullity. The clause in the submission, that no action shall be brought against the arbitrators, or umpire, precludes the plaintiff from maintaining this action. *Dossett v. Gingell*, 2 Man. & G. 870; s. c. 10 Law J. Rep. (N. S.) C. P. 183, shows that the courts have no jurisdiction over arbitrators, so as to make them reduce their charges. As between the parties, the court may review the amount to be paid. *Macarthur v. Campbell*, 5 B. & Ad. 518; s. c. 4 Law J. Rep. (N. S.) K. B. 25. It would be very inconvenient in practice, if the amount of arbitration fees were to be open to question before a jury.

Watson, for the respondent, the plaintiff below. The plaintiff is

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entitled to recover the sum demanded, 49*l.* 19*s.* 11*d.* The judge below has found as a fact that the debt has been overpaid by that amount. There is a distinction between lay and legal arbitrators. A barrister acting as arbitrator is paid by fees, and has no right of action; but a lay arbitrator has a right of action to recover on a *quantum meruit* a reasonable compensation for his trouble in making the award. He has a lien on the award for that amount, but he has no right to retain the award until any sum he chooses to fix be paid. *Hoggins v. Gordon*, 3 Q. B. Rep. 466; s. c. 11 Law J. Rep. (N. S.) Q. B. 286. *Swinford v. Burn*, Gow, N. P. 5. This submission does not give the arbitrators or umpire power to fix the amount of their own fees, but only to direct by whom the costs are to be paid. It is not contended that an arbitrator is entitled to nothing in all cases when an award is set aside; but the award may be so bad as to deprive him of any right to remuneration. *Bates v. Townley*, 2 Exch. Rep. 152; s. c. 19 Law J. Rep. (N. S.) Exch. 399, shows that the submission between the parties does not bind the arbitrators. *Fitzgerald v. Graves*, 5 Taunt. 342; *Miller v. Robe*, 3 Ibid. 461; *Barrett v. Parry*, 4 Ibid. 658; *Musselbrook v. Dunkin*, 9 Bing. 605; s. c. 2 Law J. Rep. (N. S.) C. P. 71; and *Robinson v. Henderson*, 6 M. & S. 276, show that an arbitrator cannot make himself absolute judge in his own case. The court has no power over an arbitrator. The sum was paid here involuntarily and in ignorance of the facts. In this very case, *Coombs v. Fernley*, 4 Exch. Rep. 839, the Court of Exchequer referred it to the master to tax the amount of the arbitrator's fees. In *Threlfall v. Fanshawe*, Coleridge, J., merely said, that as the party had not taken steps to object to the amount of the arbitrator's costs in due time, it must be assumed that they were reasonable. He never held that the arbitrator was a conclusive judge of the amount. If the payment be under duress of goods, even though part of the money be due, then an action "for money had and received" will lie to recover back the excess. *Ashmole v. Wainright*, 2 Q. B. Rep. 837; s. c. 11 Law J. Rep. (N. S.) Q. B. 79. *Wakefield v. Newbon*, 6 Q. B. Rep. 276; s. c. 13 Law J. Rep. (N. S.) Q. B. 258. *Atlee v. Backhouse*, *supra*. *Turner v. Deane*, 3 Exch. Rep. 836; s. c. 18 Law J. Rep. (N. S.) Exch. 343. It would be contrary to the first principles of justice that there should be no remedy for extortion on the part of an arbitrator.

Cowling replied.

WIGHTMAN, J. In this case the plaintiff has been compelled to pay a sum of money which may now be considered unreasonable and extortionate, to the extent of 49*l.* 19*s.*, 11*d.*, in order to take up the award, which he could not obtain without making the payment. It was found by the case that the plaintiff paid the money without a full knowledge of the circumstances, and in fact the payment may be considered as having been made under duress and involuntarily. The submission to reference was by agreement, and was made a rule of court, pursuant to a clause contained in it; but the Court of Common Pleas have decided that the courts have not in such case any

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summary jurisdiction over an arbitrator to compel him to refund an overcharge. Will then an action lie? It is said that it will not, even though the payment be involuntary and made under duress. It is not necessary in this case to refer to the various decisions respecting money paid under duress of goods, or any kind of duress, for those are not in any way brought into question by the appellant's counsel. But he says that no action can be brought to recover money paid under duress of goods, if there is a consideration for the payment. Now, the question in this case is, whether there was a consideration for such payment. The main ground relied upon by the appellant's counsel as the consideration, is the submission to arbitration. He contends that by that instrument the parties made the arbitrators conclusive judges as to the amount of their charges, and that, therefore, the money cannot be recovered in this form of action. It seems to me that the terms of the submission do not warrant the construction put upon them, and, consequently, do not bear out the argument. The terms are "that the costs and expenses of the submission and reference and award to be made shall be in the discretion of the arbitrators or their umpire, who may award and direct by and to whom the same shall be paid." This phrase seems to me to empower the arbitrators or umpire to point out the party who is to pay, but not to fix the amount of those costs and expenses; though I do not mean to say that if the umpire had chosen to award a reasonable amount of costs, the award could have been set aside on that ground. The umpire might, if he had thought fit, have left the amount of the costs to be settled by the master. However, he has not only exercised his discretion in saying who shall pay the costs, and in what proportion they are to be paid, but he has gone on to settle their amount. It seems to me that he should have taken care that the amount was a reasonable one, and that in case an action had been brought, a jury might have been called upon to determine, upon evidence, what was a reasonable amount. I am, therefore, of opinion that by the principles of law this action is maintainable.

ERLE, J. I am of opinion that this action is maintainable, and that it has been properly decided. By the submission, it was provided, that "the costs and expenses of the submission, reference, and award to be made shall be in the discretion of the said arbitrators or of their umpire, who may award and direct by and to whom the same shall be paid." In the exercise of that power it may be taken that the umpire has awarded to himself 49*l.* 19*s.* 11*d.* more than by law he was entitled to, and more than would be a reasonable compensation for making the award, and that the plaintiff was unable to obtain the award without paying the arbitrators' charges. It is also found in the case that there was reason to believe that the expenses of the reference might be included in the sum demanded. The money, therefore, may be said to have been paid under ignorance of the facts. But it does not appear to me that that is very important in this particular case. For the award was detained from the plaintiff wrongfully until he paid the demand, and *Ashmole v. Wainwright*

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fully decides that a party may recover back the excess which has been extorted by duress of goods contrary to law. Here the question seems to me, whether the umpire can say that the money demanded was his by law. His counsel maintains that proposition for him, and rests it upon the point that where the submission is in terms like the present, the referee not only has power over the parties so as to be able to say which party shall pay the costs, but also that he has absolute power over the amount which the party has to pay. For if no one can review the amount, it would be giving the umpire an absolute power to determine it. It seems to me that the power here given to the umpire is a power to lay the burden of the costs of the award on either party, but that it does not give him an absolute power to fix the amount of such costs. There are various cases showing that this is the correct view of the law. *Fitzgerald v. Graves*, *Miller v. Robe*, and *Musselbrook v. Dunkin*, all contemplate that the amount of the fee awarded by an arbitrator for himself is not decisively fixed. Mr. Watson, in his Treatise on Awards, p. 108, 3d ed., says, "It is not usual" for arbitrators "to name a certain sum for their fee; there are obvious motives of delicacy which prevent an arbitrator from naming the fee to be paid to him for his trouble." It is very common for an arbitrator to say in his award that a particular party shall pay the costs of the award, without specifying any sum as the amount of those costs. Now, if the amount of the fee were referred to the arbitrator, he would be bound to decide on its amount as much as on any other matter submitted to him, or the award would be bad. That common form of award, therefore, seems to me to be conclusive against the argument of the appellant's counsel. The judgment of the Court of Exchequer in the present case assumes as a principle, that an arbitrator cannot fix his own fee, for the award here is a perfectly good award in other respects, and the matter brought before that court and objected to was as to the amount of the costs of the award, and the court dealt entirely with the amount of those costs. They wanted the consent of the parties merely to allow the matter to be referred back to the master, for the court would have set aside the award had that consent not been given. The case of *Dossett v. Gingell* is, I think, distinctly in accordance with the view I am taking; for there the court say that the arbitrator after he has made his award is a person over whom the court had no extraordinary jurisdiction. But the learned reporter of that case adds a marginal note expressing his opinion, that, therefore, an action for money had and received would lie. It appears to me that that learned reporter came to a very correct opinion upon the point, for the court must either decide that the arbitrator shall be permitted to keep an exorbitant amount of remuneration, or that an action for money had and received will be maintainable. It seems to me that the action for money had and received to recover back the excess is, according to the principles of law, well maintainable. It has been contended that there would be great inconvenience in allowing the amount of an arbitrator's charges to be reviewed by a jury. I can only say, that to hold that exorbitant

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fees are to pass unquestioned would, in my opinion, be an evil which would more than counterbalance the opposite evil which it is said might arise from having the question of arbitrators' costs frequently brought before a jury.

Appeal dismissed with costs.

HARE v. HYDE.¹

Hilary Term, January 31, 1851.

*Arrest under civil Process — Privilege morando et redeundo —
Acquittal on a criminal Charge.*

A person acquitted on a criminal charge is not entitled to privilege from arrest under civil process, *morando aut redeundo*.

Where, therefore, the defendant in a civil action, immediately after his acquittal and discharge on a trial for a charge of embezzlement at the Quarter Sessions, and whilst he remained in the court, was arrested under a writ of *capias* in the action, this court refused to discharge him out of custody.

THIS was a rule calling upon the plaintiff to show cause why the defendant should not be discharged out of custody, under a writ of *capias* issued against him in this action.

It appeared from the affidavits, that the defendant had been tried upon a charge of embezzlement, at the Epiphany Quarter Sessions for the West Riding of Yorkshire, and being thereupon acquitted and ordered to be discharged, he was, when in the act of leaving the prisoners' dock, and whilst the court was sitting, arrested under the above-mentioned writ, and, subsequently, kept in custody. A similar application to the present had been made to Erle, J., at chambers, and he had refused to order the defendant's discharge.

Pickering now showed cause. The ground of this application is, that the defendant was privileged from arrest when taken into custody; but no such privilege can be supported. It is quite clear that a person discharged upon a criminal charge has no protection from civil process, either *morando* or *redeundo*.

[Wightman, J. Upon the motion for the rule, it was said to be the privilege of the court.]

All the cases on the subject are based upon that ground; Anonymous, 1 Dowl. P. C. 157; *Jacobs v. Jacobs*, 3 Ibid. 675; *Goodwin v. Lordon*, 1 Ad. & E. 378, and show that the defendant had no such personal privilege. There is here no ground for the exercise of any discretion in the court.

[Lord Campbell, C. J. The defendant may be considered as having been in the Court of Quarter Sessions, after his acquittal, just as any other of the queen's subjects present. If the arrest had been made so as in any way to disturb the proceedings of that court, it might in its discretion have punished for the contempt.]

¹ 20 Law J. Rep. (N. S.) Q. B. 185. 15 Jur. 315.

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Just so; and the three cases cited show that the defendant was not entitled to any personal privilege.

The court then called upon

Pashley, contra. The defendant is entitled to the same protection under this application as he would have been by a writ of privilege. Com. Dig. tit. "Privilege," A. There are decisions of the Irish judges which directly support the right of the defendant to be discharged, on the ground of his privilege from arrest under civil process, when discharged as here from a criminal charge. *Callans v. Sherry*, 1 Alc. & Nap. 125. *The King v. M'Laughlin*, Ibid. 130. *Kelly v. Barnewall*, Cook & Alc. (Irish Rep.) 94. It is for the interest of the public that such privilege should exist in criminal as well as civil cases, and if a party has the privilege *redeundo*, he must equally be entitled to it *morando*.

[*Lord Campbell*, C. J. If the defendant were within a part of the privilege, we should no doubt think him entitled to the entire privilege, and summarily discharge him.]

It is important that freedom from the fear of arrest should be secured in all legal proceedings.

LORD CAMPBELL, C. J. I am of opinion that the defendant had no privilege from this arrest upon the ground of his being tried and acquitted and still present in court when arrested. After having been acquitted, he remained in court like any other of the *circumstances*. The cases cited show clearly that, by the law in England, the defendant would have had no privilege whilst returning home from the court, and if so, he cannot have any such privilege by remaining as a spectator in the court. In some cases, circumstances might make it proper to interfere and discharge a person arrested in a court of justice, but in this case the question is, whether we will summarily discharge a party from custody, simply because he has been arrested in a court of justice, and I think there is no ground for our interference. We are not to vindicate the privilege of the court where the arrest took place, but only to see whether the defendant was entitled to any personal privilege from arrest under the process of this court; and I think he was not. I have the most sincere respect for the opinions expressed by the Irish judges in the cases cited, but they are contrary to the decisions of the courts here, and with the latter my opinion concurs.

PATTESON, J. The defendant has been arrested, in so far as he is personally concerned, rightly, and, therefore, he ought not to be discharged.

COLERIDGE and WIGHTMAN, JJ., concurred.

*Rule discharged with costs.*¹

¹ A similar decision was made in *Lucas v. Abbe*, 1 Denio, 666, (1845,) where it was held, that a person who had been tried and con-

vinced in a court of special sessions for an assault and battery was not privileged, *redeundo*, from arrest in civil suit for the

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WALKER v. EDMUNDSON.¹

Bail Court, Michaelmas Term, November 25, 1850.

Insolvency—Bankruptcy—Discharge by Insolvent Court—Discharge of Defendant out of Custody by the Plaintiff—Subsequent Arrest upon a Certificate in Bankruptcy.

The plaintiff having recovered judgment in the Court of Exchequer took the defendant in execution. The defendant petitioned the Insolvent Court, inserting the plaintiff's debt and costs in his schedule. The plaintiff sued out a petition in bankruptcy, upon which the defendant was adjudged a bankrupt. The plaintiff then, with a view of proving his debt under the commission in bankruptcy, agreed to the discharge of the defendant. The Insolvent Court afterwards discharged the defendant. Subsequently, the bankruptcy commissioner granted the plaintiff a certificate, under sect. 257 of the stat. 12 & 13 Vict. c. 106, that he was a creditor for the amount of his debt, minus the costs, upon which the plaintiff sued out a *ca. sa.* in this court, and arrested the defendant.

The court refused to set aside the *ca. sa.*, or to discharge the defendant out of custody; and held, that sects. 40, 90, and 91 of the stat. 1 & 2 Vict. c. 110, did not apply so as to entitle the defendant to freedom from arrest; that sect. 257, of the stat. 12 & 13 Vict. c. 106, applied to creditors who had obtained judgment before proof as well as to other creditors; that the voluntary discharge of the defendant from arrest did not preclude the plaintiff from arresting him on the certificate; that even if the plaintiff were not a good petitioning creditor, by reason of his having arrested the defendant, as no proceedings had been taken in the Court of Bankruptcy to supersede the proceedings, the certificate must be considered as valid, and the *ca. sa.* regular; and that the stat. 12 & 13 Vict. c. 106, has transferred all questions as to the discharge of a bankrupt to the Court of Bankruptcy:—

Held, also, that sect. 40, of the stat. 1 & 2 Vict. c. 110, applies only when the bankrupt has obtained a certificate of conformity, and that it was inserted merely to have the effect of

same offence. The privilege of exemption from arrest seems to be, as was argued in the case of *Hare v. Hyde*, in some respects the privilege of the court, and the indulgence to the party will not be extended further than the necessity and expediency of the case requires. *Hunter v. Cleveland*, 1 Brevard, 167, (1802.) *Brooks v. Chesley*, 4 Harris & McHenry, 295, (1799.) It is an application to the discretion of the court, and they will so exercise it, that, on the one hand, the defendant shall not be oppressed, and on the other, that the plaintiff shall not be deprived of a trial. *Taft v. Hoppin*, Anthon, 187, (1816.) In some respects, also, the privilege is a personal privilege, and may be waived by the party entitled to it. *Chase v. Fish*, 16 Maine, 132, (1839.) And it would seem that, if the defendant when arrested does not insist upon his privilege, but voluntarily gives bail, and submits to the arrest without objection, that this would be a waiver of the privilege. See *Brown v. Gelchell*, 11 Massachusetts, 11, (1814.) *Fletcher v. Baxter*, 2 Aikens, 225, (1826.) For every privileged person must, at a proper time and in a proper manner, claim the benefit of his privilege, or it is

waived. *Geyer v. Irwin*, 4 Dallas, 107, (1790.) So, pleading in bar to the action is a waiver, although the party was ignorant of his legal rights. *Randall v. Crandall*, 6 Hill, 342, (1844.) The objection should be pleaded in abatement. *Grove v. Campbell*, 9 Yerger, 7, (1836.) *Hubbard v. Sanborn*, 2 New Hampshire, 468, (1822.) *Willington v. Stearns*, 1 Pickering, 497, (1823.) But in Vermont a writ will not abate, merely because the defendant was arrested while attending court as a witness. *Booraem v. Wheeler*, 12 Vermont, 310, (1840.) And since a party attendant upon court is, for the purposes of the court, privileged from arrest, but not from service of process in any other form, it would seem that, if such party is arrested and held to bail, the bail should, on application to the court, be discharged, but that the service of the writ, if otherwise sufficient, should not be set aside. See *Hunter v. Cleveland*, 1 Brevard, 167, (1802.) However, if bail so taken are not discharged, the bail bond is not void, merely because the arrest was in the first instance voidable, but the sureties will be liable. *Fletcher v. Baxter*, 2 Aikens, 224, (1826.) *Chase v. Fish*, 16 Maine, 132, (1839.)

¹ 20 Law J. Rep. (n. s.) Q. B. 186.

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keeping alive the proceedings in the Insolvent Court, only for the purpose of enabling the assignees under the insolvency to reach the property of the bankrupt acquired after the bankruptcy.

THIS was a rule obtained by the defendant, calling upon the plaintiff to show cause why the writ of *capias ad satisfaciendum*, issued in this cause on or about the 24th of July last, should not be set aside for irregularity, and why the said defendant should not be discharged out of the custody of the sheriff of York as to this action.

In November, 1849, the plaintiff commenced an action in the Court of Exchequer, to recover a debt from the defendant. On the 28th of December, 1849, the defendant was arrested, at the suit of one Wood, and committed to York Castle. On the 29th of December, 1849, the defendant filed his petition for protection in the Insolvent Debtors Court for the Leeds district; and on the 1st of January, 1850, he filed his schedule, inserting the plaintiff's name as a creditor in respect of the debt and costs in the action. On the 12th of January, 1850, the plaintiff having previously recovered judgment in the action for 80*l.* 2*s.* 8*d.*, sued out a writ of *capias ad satisfaciendum*, and lodged a detainer against the defendant. The plaintiff then petitioned the Leeds District Court of Bankrupts to adjudge the defendant a bankrupt, and the defendant was accordingly, on the 25th of January, 1850, adjudged bankrupt. On the same day, but after the adjudication, the plaintiff, by writing, discharged the defendant from the detainer in the action, with the view of proving his debt under the commission. On the 26th of January, the judge of the County Court of Yorkshire, after hearing the matters of the insolvency, made an order, discharging the defendant from custody. The defendant surrendered himself before the bankruptcy commissioner. His examination was adjourned from time to time, and ultimately *sine die*. The plaintiff obtained a certificate from the Court of Bankruptcy, under sect. 257 of the stat. 12 & 13 Vict. c. 106, according to the form in the schedule, (B a,) certifying that the plaintiff was a creditor to the amount of the debt recovered in the action, and that the defendant was not protected by the court from process against his person. On this certificate the plaintiff, on the 24th of July, 1850, sued out a writ of *capias ad satisfaciendum* in this court, and on the 7th of August, arrested the defendant under it, who was again conveyed to York Castle.

Atherton showed cause, November 23. This court has no power to discharge the defendant out of custody. He is not taken in execution on the judgment in the action, but under process which issued on the certificate of the commission in bankruptcy that the plaintiff was a creditor of the defendant, and that the defendant was not protected. This certificate, which issued by virtue of 12 & 13 Vict. c. 106, s. 257, gives a new process against the debtor, a process not for the satisfaction of the creditor so much as for the punishment of the debtor, whose conduct has failed to entitle him to his certificate of conformity. Sect. 259 confirms this construction of the effect of the previous section, by providing that when a bankrupt has

been arrested on the commissioner's certificate under sect. 257, he is not to be discharged until he has been imprisoned for twelve months, except by order of the Court of Bankruptcy. The liability of the defendant to arrest under the stat. 12 & 13 Vict. c. 106, the Bankruptcy Consolidation Act, is not prevented by his having been previously discharged from execution by the Insolvent Debtors Court, under the stat. 1 & 2 Vict. c. 110, s. 90. Sect. 40 of that act is inserted with the view of giving the assignees under the insolvency control over the property of the bankrupt acquired after the bankruptcy. Sects. 85, 90, and 91, of the same statute, which prevent the arrest of an insolvent by reason of any debt or by reason of any judgment or order for the payment of a sum of money, do not, it is submitted, apply to this case, which was not an arrest by reason of any debt or judgment to which the adjudication of the Insolvent Court extended, but by reason of the certificate of the commissioner of bankrupts. But even if sect. 90, of the 1 & 2 Vict. c. 110, be supposed to be inconsistent with sects. 257 and 259 of the stat. 12 & 13 Vict. c. 106, it must be taken that the latter statute, so far as is necessary, repeals and overrides the former.

[*Patteson, J.* It appears that the judgment was recovered in the Court of Exchequer, and that the *capias ad satisfaciendum*, under which the defendant is in custody, issued out of this court. That shows that the arrest was not on the original judgment.]

Another objection which will be made is, that the plaintiff having once consented to the discharge of the defendant out of custody, cannot arrest him again for the same debt. In ordinary cases, the well-known rule of law is, that when the creditor has taken the debtor into custody, he has a satisfaction for his debt. But the second arrest was not for the same debt. The first arrest was for debt and costs; the second was for the debt only. The *capias* under which the defendant was arrested did not issue on the judgment. The plaintiff discharged the defendant in order that he might prove his debt under the bankruptcy. The court will not examine whether the plaintiff be a good petitioning creditor, but will leave the defendant to apply to the Court of Bankruptcy for relief, if he be entitled to any on that ground.

Hugh Hill, in support of the rule. The prisoner is entitled to be discharged. The plain meaning of the stat. 1 & 2 Vict. c. 110, s. 90, is, that a prisoner cannot be again arrested for the same debt or costs, or for any part of them, in respect of which he has been discharged out of custody by the Insolvent Debtors Court. The Bankruptcy Consolidation Act, sect. 257, when construed with the form given in the schedule, does not repeal the provisions of the former act relating to insolvents. It does not apply to the case of creditors who have obtained judgment before proving their debts before the commissioner of bankruptcy. Secondly, the plaintiff, having consented to the discharge of his debts, cannot arrest him again for the same debt. "*Nemo debet bis vexari pro eadem causâ*" is a fundamental maxim of law. Sect. 257 does not apply to a case where a creditor

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has once arrested and discharged his debtor. Thirdly, though the plaintiff might prove his debt under the commission by the operation of the statute, 6 Geo. 4, c. 56, s. 59, yet, having obtained satisfaction of his debt by taking the defendant in execution, he is not a good petitioning creditor, and therefore the proceedings are void and the arrest unwarranted. *Cohen v. Cunningham*, 8 Term Rep. 123. *Baker v. Ridgway*, 2 Bing. 41; s. c. 2 Law J. Rep. C. P. 110.

Cur. adv. vult.

Judgment was now delivered by

PATTERSON, J. The plaintiff in this case had recovered a judgment against the defendant, and had taken him in execution under a *ca. sa*. The defendant petitioned the Insolvent Court, and thereby committed an act of bankruptcy. The plaintiff agreed to his discharge and sued out a petition in bankruptcy, after which the Insolvent Court discharged the defendant. The proceedings in bankruptcy went on, the plaintiff proved his debt, and ultimately the commissioner before whom they took place granted a certificate to the plaintiff under sect. 257 of the 12 & 13 Vict. c. 106, according to the form (B a) in the schedule. A *capias ad satisfaciendum* issued out of the court on the production of that certificate, under which the defendant is now in custody. It is contended that he ought to be discharged, principally on two grounds. First, that sect. 257 does not apply to creditors who had obtained judgment before proof. Secondly, that the plaintiff, having voluntarily discharged the defendant, was not a good petitioning creditor, and therefore cannot proceed on the commissioner's certificate. As to the first, I am clearly of opinion that the section applies to all creditors who prove their debts, whether those debts be on judgments or not; otherwise, judgment creditors would be put in a worse situation than simple contract creditors, which never could have been the intention of the legislature. All creditors who prove under a *fiat* or petition thereby make their election, and were precluded from enforcing their claims against the bankrupt by action or execution, until the recent act of Parliament gave them the power of doing so by means of the commissioner's certificate. They are still precluded from suing the bankrupt or issuing execution on their judgments, if they have any; but it is plain that sect. 257 makes them judgment creditors *de novo*, as it were, and the certificate of the commissioner enables them to proceed as such by *capias ad satisfaciendum* only. If, therefore, the plaintiff had been merely a judgment creditor, not having taken the defendant in execution, and had proved, the proceedings would clearly have been quite regular. Further, if he had not been a petitioning creditor, but had taken the defendant in execution and another creditor had sued out the petition, the proceedings would, I think, still have been regular. Such a judgment creditor is not satisfied, so far as relates to bankruptcy proceedings. By sect. 59 of the 6 Geo. 4, c. 16, he is enabled to prove, but not "without giving a sufficient authority in writing for the discharge of such bankrupt." This was a legislative enactment, that taking a debtor in execution should be no satisfaction of the debt so as to

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prevent the creditor from proving in bankruptcy, and that discharging him should not have such effect; for the discharging is made a condition of enabling the creditor to prove. The provision as to creditors having their debtors in execution is, however, omitted in the corresponding section of 12 & 13 Vict. c. 106, viz., sect. 182; for what reason I know not; but the omission can at most have the effect only of leaving such creditors in the situation in which they were before 6 Geo. 4, c. 16; and that is, that by the practice of the court, though not by express law, they are enabled to prove.

The case, therefore, is reduced to the question as to the plaintiff being a petitioning creditor, and to the point whether I can treat all the proceedings as void on that account. In *Cohen v. Cunningham* it was held, that a plaintiff who had taken his debtor in execution could not petition, though the Court of Chancery, or rather the lord chancellor sitting in bankruptcy, was in the habit of allowing such creditor to prove under a commission issued on the petition of another person. Probably that case would govern and be decisive whenever the same point should directly arise; but assuming it to be so, the well-known power given by acts of Parliament subsequent to that case, of substituting a good petitioning creditor in lieu of one whose debt is insufficient, has provided a remedy for such mischance, and renders it less proper for a court of law to hold all the proceedings void, especially upon motion. As, therefore, no steps have been taken in bankruptcy to supersede the proceedings, but they have been carried on altogether as being good, and the plaintiff has been allowed to prove, I cannot hold that the certificate of the commissioner under the recent act is void; consequently, I think that the *capias ad satisfaciendum*, as matters now stand, is regular. A point was made as to the effect of sect. 40 of the 1 & 2 Vict. c. 110, under which it was contended that the Insolvent Court could discharge the insolvent absolutely, notwithstanding the proceedings in bankruptcy. Upon considering that section in connection with the rest of that act, I am of opinion that it was intended to keep alive the proceedings in the Insolvent Court only for the purpose of reaching the future estate of any bankrupt who should obtain his certificate; that is, any estate acquired by him after such certificate through the means of the warrant of attorney directed by the act, and that it has no operation where the bankrupt, as here, does not obtain his certificate. I also think that the recent act, 12 & 13 Vict. c. 106, transfers all questions as to the bankrupt's discharge to the Bankruptcy Court. This rule must, therefore, be discharged, but without costs.

Rule discharged accordingly.

Marson & another v. Lund.

MARSON & another v. LUND¹

Hilary Term, January 24, 1851.

Scire Facias — Pleading — *Joint-stock Company* — 7 & 8 Vict. c. 110, s. 66, 68 — *Debt due from Company* — *Execution against individual Shareholder*.

Sci. fa. against a member of a company completely registered under the Joint-stock Companies Act, 7 & 8 Vict. c. 110, to obtain satisfaction of a judgment and execution against the company, the plaintiff having failed to obtain satisfaction of the said judgment, by execution against the property and effects of the company. Plea — First, that due diligence had not been used to obtain satisfaction by execution against the effects of the company, concluding with a verification.

Secondly, that no rule or order of the court or a judge had been obtained for leave to issue the *sci. fa.* Replication to the first plea, that due diligence was used to obtain satisfaction by execution against the property of the company, concluding to the country : —

Held, upon demurrer, that the 68th section of the 7 & 8 Vict. c. 110, was cumulative only, and did not preclude the plaintiff from proceeding by *sci. fa.*, to obtain satisfaction of his judgment from the defendant, under the 66th section : —

Held, also, as to the pleadings, first, that the second plea was bad; secondly, that the replication was sufficient, and properly concluded to the country.

SCIRE FACIAS. The declaration set out the writ, which recited that a judgment had been recovered by the plaintiffs against the Universal Salvage Company, then and still being a company completely registered and incorporated under the 7 & 8 Vict. c. 110, for 1206*l.* 5*s.* debt and damages, and that such judgment had been entered upon the 1st of February, 1848. That although due diligence had been used by the plaintiffs to obtain satisfaction of the said judgment by execution against the property and effects of the said company, yet the said plaintiffs had not obtained and could not obtain satisfaction of the said judgment, by execution against the property and effects of the said company or otherwise, and that execution of the said debt and damages remained to be made to the plaintiffs, and that the present defendant, C. Lund, was then a shareholder of the said company. The writ then, in the usual form, directed the sheriff to require the said C. Lund to show cause, if any, why the plaintiffs should not have execution against him for the said debt and damages, together with interest upon the same from the said 1st of February, 1848. The declaration further stated the return by the sheriff to the effect that the said C. Lund had been required, &c., as by the said writ was commanded, and that thereupon the plaintiffs prayed that execution might be adjudged to them for the said debt and damages and interest, according to the force, form, and effect of the said judgment and the statute in that case made and provided.

Pleas — First, that due diligence had not been used by the plaintiffs to obtain satisfaction of the said judgment, by execution against the property and effects of the said company. Verification.

Second, that the plaintiffs ought not to have execution, because the

¹ 20 Law J. Rep. (N. S.) Q. B. 190.

writ of *sci. fa.* "was not sued forth, or issued by, or in pursuance of the leave, rule, or order of the court of our lady the queen, &c., or of any judge of the said court given or made in that behalf, according to the form of the statute in such case made and provided, or in any manner howsoever, but was issued and sued forth without any such leave, rule, or order, and there never was any such leave or order for the issuing or suing forth the same, and this the defendant is ready to verify, wherefore," &c.

Replication to the first plea, that due diligence was used by the plaintiffs, before the issuing of the *sci. fa.*, to obtain satisfaction of the said judgment by execution against the property and effects of the said company; concluding to the country.

Demurrer to the second plea, on the ground that no leave, rule, or order of the court or of any judge was necessary previously to the issuing and suing forth of the *sci. fa.*, or if it were, the want thereof could not be pleaded as a defence to bar the plaintiffs from having execution on the said judgment. Joinder therein.

Demurrer to the replication, on the ground that it ought to have alleged what sort of writ of execution had issued against the property and effects of the company, or that the company had no property or effects against which execution could issue, so that the existence of the execution, might have been raised as an issue for the court, and that it ought to have shown what diligence the plaintiff had used, and how, and ought to have concluded with a verification. Joinder therein.

The defendant also objected that the *sci. fa.* was bad in law.

Bramwell, for the plaintiffs. One objection to be taken to the writ itself is, that the only mode of proceeding in a case like this, is that pointed out in the 68th section of the 7 & 8 Vict. c. 110. But there is nothing inconsistent in having the common law proceeding by *sci. fa.*, in addition to the summary proceeding upon motion or summons given by that section. A *sci. fa.* may not be necessary, but it is not, therefore, wrong.

[*Lord Campbell*, C. J. The act may be considered as not introducing a single new mode of proceeding.]

It does not. The proceeding by *sci. fa.* is tacitly contained in the 66th section. Then sect. 68, which points out a particular mode of obtaining the execution given by the 66th section, is not prohibitory, but cumulative merely. If the objections taken were to prevail, no *sci. fa.* could now, in a case like this, issue on a judgment twenty years old.

[*Patteson*, J. The proceeding by *sci. fa.* deprives the party of the benefit of the notice required by the proviso to the 68th section.]

That notice is strictly confined to the proceeding by motion, and cannot, therefore, make any difference.

Willes, contra. This is not like the case of reviving a judgment against the same person. The act provides for a remedy by execution, which does not exist in the case of ordinary corporations, and

the question is, whether, upon a judgment obtained against the company, a *sci. fa.* can be applied for against a member. If the 66th section had stood alone, a *sci. fa.* would have been the proper remedy as in cases under the Banking Act, the 7 Geo. 4, c. 46, s. 13. But the 68th section, which is to be taken with the 66th, silences the implication in that respect otherwise derivable from the 66th, and points out the only mode of proceeding. It would be a serious inconvenience to allow of a proceeding by *sci. fa.*, which may issue without the leave of the court, as expressly required for the proceeding under the 68th section. Then, as to the replication, it is bad for uncertainty. "Due diligence" must be shown, and it should have been shown what sort of execution and diligence had been used to obtain satisfaction of the judgment from the property of the company. The instance of an action upon a recognizance of bail is most like this. To the plea alleging that no *ca. sa.* had been duly prosecuted upon the judgment, the replication sets out the *ca. sa.* 3 Chit. on Plead. 211, 461. Several issues might be raised upon the question of due diligence, and uncertainty in that respect is objectionable. Com. Dig. "Pleader," C, 22.

Bramwell, in reply. The allegation of due diligence in the declaration was traversable. Here it is traversed, but with a wrong conclusion, and the plaintiff might have demurred specially. The replication could not properly be otherwise than in its present form. As to the main point, it would be strange if a party might be brought before the court by summons or rule, but not by a *sci. fa.*, under which the question of liability could be more fully and effectually argued. There are no negative words in the 78th section, and a mere permissive enactment cannot take away a writ which a party before had as of right.

LORD CAMPBELL, C. J. The plaintiff is entitled to our judgment. First, as to whether it is competent for the plaintiff to have a writ of *sci. fa.* Looking to the 66th section alone, there is no doubt whatever upon the point, because that section impliedly gives such remedy against a shareholder, upon the condition of due diligence having been used to obtain satisfaction against the property and effects of the company. But then arises the question, whether the *sci. fa.* is taken away by the 68th section. It seems to me that section is cumulative, and merely provides for certain conditions to be attached to the summary remedy which it points out, and which may be very useful in some cases. I see no hardship to the defendant in allowing the *sci. fa.*, because, if no due diligence had been used, that would be a good answer to it, as would be any other substantial defence that might be brought forward. As to the sufficiency of the pleas, the second plea has been abandoned, and it is quite clear that it could not be sustained. It sets up no more than at most would amount to a mere irregularity. Then, as to the first plea, it would have been idle for the replication to conclude in any other way than to the country. If the objection were valid, it would have been necessary to state not only the writ of

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execution against the company, but also all that had been done under it, and that the rules of pleading do not require.

PATTESON, J. Under the 66th section it is quite clear that a *sci. fa.* is necessary; and the only question is, whether the 68th section is cumulative or prohibitory. It is not prohibitory in terms, nor, as I think, in its construction, but cumulative only. As to the issue raised by the replication, of whether or not due diligence had been used, that is a question of fact, involving many circumstances, and it would be very inconvenient to require them to be fully stated upon the record. These circumstances are evidence to show due diligence or want of it, and the replication properly concludes to the country.

COLERIDGE, J. I thought differently at first, from the opinion just expressed, but in that opinion I now concur. The words of the 68th section are merely permissive, and not prohibitory; and although a good deal may be urged both ways as to the intention of the legislature, the only safe rule is to abide by the words used, and, as the legislature has not in terms taken away the *sci. fa.*, to hold the proper construction to be that the 68th section is cumulative, and the plaintiff therefore entitled to proceed by *sci. fa.*

Judgment for the plaintiff.

ELLISON v. ACKROYD.¹

Bail Court, Michaelmas Term, November 25, 1850.

Arbitration — Umpirage — No Award by Arbitrators — Charges of Arbitrators — Costs of Umpirage.

By an agreement of reference matters were referred to two arbitrators, and if they failed to make an award within a limited time, to an umpire. The costs of the reference and award and umpirage were to be in the discretion of the arbitrators and umpire respectively. The parties agreed that the umpire should sit with the arbitrators, so that, if they did not make an award, it would not be necessary for him to rehear the evidence. The arbitrators did not conclude the reference within the time limited. The parties then further agreed, that the arbitrators should sit with the umpire, and assist him in taking the evidence, which they did. The award ordered the losing party to pay to the other the costs "the said umpirage and of this my award," and that each party should "pay their own costs of the reference other than the costs of my said umpirage and of this my award." The umpire included the charges of the two arbitrators in his costs of umpirage and award, and the same were paid by the successful party on taking up the award:—

Held, that the charges of the arbitrators were costs of the umpirage, and not costs of the reference; and that the successful party was entitled to have such amount as was duly charged by the arbitrators, and paid by him on taking up the award, allowed on the taxation of costs, and to have the same repaid to him by his opponent.

THIS was a motion to review the master's taxation with respect to the costs of a reference and award.

The affidavits disclosed the followed facts: An agreement of refer-

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ence was entered into, dated the 6th of August, 1849, between F. B. Ellison and G. Ellison, and W. Ackroyd and T. Ackroyd. It recited that disputes had arisen respecting trespasses, alleged to have been committed by the parties, to certain collieries, of which they were respectively the owners, and then referred the disputes to J. A. and W. W., and proceeded, "and in case the said arbitrators do not make their award within the time hereinafter mentioned, then to the umpirage of such person as the arbitrators shall indifferently choose for umpire." It provided further, that "the costs of these presents, and of the reference and award and umpirage," &c., "shall be in the discretion of the said arbitrators and umpire respectively, who shall direct and award by and to whom and in what manner the same shall be paid." The agreement limited a time within which the arbitrators were to make their award. The arbitrators duly appointed J. W. as umpire. It was arranged between the parties, before entering upon the reference, that the umpire should sit with the arbitrators to hear the evidence. The umpire accordingly sat during the whole inquiry with the arbitrators. The arbitrators did not agree in an award within the time prescribed for them, and the duty of making it devolved upon the umpire. It was then further agreed between the parties to the reference, that the arbitrators should continue to sit with the umpire, and assist him in taking the evidence, as they were persons of skill and experience in matters connected with collieries. The arbitrators accordingly sat with the umpire during the rest of the inquiry, but they acted as the agents of the respective parties rather than as judges. The umpire awarded that the Ackroyds were guilty of certain trespasses; that the Ellisons were not guilty, and that the Ackroyds were to pay 780*l.* damages to the Ellisons. The award as to costs was as follows: "That the costs of the said in part recited agreement of the 6th of August, 1849, and also of the said umpirage and of this my award, (such costs to be taxed by the proper officer in that behalf, if the said T. A. and W. A. choose to tax the same,) shall be paid by the said W. A. and T. A." to the said F. B. E. and G. E.; "and that each of them, the said F. B. E. and G. E., or W. A. and T. A., shall pay their own costs of the reference other than the costs of my said umpirage and of this my award."

On the 1st of April, 1850, the umpire's attorney wrote to Messrs. Ellison, saying that the umpire had made his award, and that it was ready to be delivered to the parties "on payment of the costs of umpirage and award, amounting to the sum of 370*l.* 7*s.*, the particulars of which are as follows: Mr. W. W.'s" (the arbitrator appointed by the Ackroyds) "bill, 102*l.* 18*s.* 6*d.*; Mr. J. A.'s" (the arbitrator appointed by the Ellisons) "bill, 107*l.* 2*s.*; Mr. J. W.'s" (the umpire) "bill, 132*l.* 3*s.*; our charges and counsel's fees, 28*l.* 3*s.* 6*d.*; total, 370*l.* 7*s.*" The Ellisons on the same day took up the award, and paid the 370*l.* 7*s.* On the 5th day of April the umpire's attorney handed over to the arbitrators the amounts of their respective bills. The Ellisons, on the taxation of costs, claimed to be allowed all the 370*l.* 7*s.*, "as costs of the umpirage and award."

On the other side, it was contended, that the sums paid to the two

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arbitrators could not be allowed, as they were costs of the reference which each party had to bear, and not of the award or umpirage. The master being of that opinion, refused to allow any portion of the arbitrators' charges. The umpire made an affidavit, stating that he intended to include the arbitrators' charges in the costs of the umpirage, which were to be borne by the Ackroyds.

Hugh Hill now showed cause. The master was perfectly right in his taxation of costs. The charges of the arbitrators ought not to have been allowed.

[*Patteson, J.* Do you say that if two arbitrators disagree and make no award, they are not to be paid any thing?]

It is submitted they are not. If they make no award, it is their own fault. If a special jury is discharged without coming to a verdict, the members of it are paid nothing. Here the arbitrators acted as advocates. Their remedy is against the parties who employed them respectively. The umpire was under no obligation to pay them any thing. Even if arbitrators are ordinarily entitled to remuneration, the court might well hold that these arbitrators are not so entitled, as they changed their characters into those of advocates. Their charges are costs of the reference, if they fall under the head of costs at all. In *Coombs v. Fernley*, 4 Exch. Rep. 839, where the question was as to the exorbitant claims of the arbitrators, the point was not raised as to whether the arbitrators were entitled to costs at all. The arbitrators' charges are not costs of the umpirage or of the award.

Atherton, in support of the rule. The master was wrong in disallowing the charges for the arbitrators. These charges are properly costs of the umpirage, or costs of the award. The award intends to dispose of all costs, both of reference, umpirage, and award. It says the parties are to bear *their own* costs of the reference. That must mean the sums paid by each out of his own pocket. The court will put such a construction upon the expression, "costs of umpirage and award," as will make it cover all costs other than those of the reference as above defined. The costs of the arbitrators were expenses common to both parties, not peculiar to each party as ordinary costs of reference. The umpire intended to include the arbitrators' charges as costs of the umpirage. A portion of these costs clearly fall within the expression "costs of the umpirage." For when, after the time for making their award had elapsed, the arbitrators at the request of the parties sat with the umpire to assist him, they were entitled to recompense for such services, and as those services conduced to the making of the umpirage, the expenses of the arbitrators in respect of them are reasonably costs of the umpirage.

PATTESON, J. It was agreed in this case by the parties, before entering upon the reference, that the umpire should sit with the two arbitrators, so that, in case of their differing in opinion, he might make his award without having to hear the evidence over again. The

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arbitrators did not conclude the reference within the time limited for their making an award, and the matter consequently devolved upon the umpire. It was then further agreed by the parties to the reference that the arbitrators should continue to sit with the umpire, and act as his assessors, until he had finished the case, for they were men of more science than the umpire, and were able to assist him in the examination of scientific witnesses. It appears, however, that the two arbitrators acted (as is almost always the case under such circumstances with lay arbitrators) as the advocates of the parties who respectively had appointed them. After making his award, the umpire gave notice that it might be taken up "on payment of the costs of umpirage and award," and he specified what those costs were, not only their total amount, but how he made up that amount, and he showed that he included in them the charges of the two arbitrators. The money was paid, and the award taken up by the Messrs. Ellison, and it then appeared that the umpire had directed that Messrs. Ackroyd should pay the costs of the umpirage and award, and that each party should bear his own costs of the reference. When the costs came to be taxed, the master disallowed the charges for the attendance of the arbitrators, being of opinion that they were not costs of the umpirage but of the reference, which, by the terms of the award, each party was to bear for himself. This decision of the master seems to me to be erroneous. The arbitrators' charges cannot, I think, in this case be considered as costs of the reference, for the award says each party "shall pay their own costs of the reference other than the costs of my said umpirage and award." These costs cannot properly be said to fall under the term "*their own* costs of the reference," for by that expression the umpire must have meant that those sums which each party had laid out for himself should be borne by him as his burden. The question then is, whether the charges of the two arbitrators can be considered as costs of the umpirage. It is clear that the umpire intended to include them under that description, for they were specified by him as part of the costs of the umpirage, to be paid on taking up the award. I think, therefore, that under all the circumstances of the case, they may fairly be considered as costs of the umpirage, which, by the terms of the award, the Messrs. Ackroyd are bound to pay. The rule, therefore, must be absolute, and the master must review his taxation, and allow costs in respect of the arbitrators; though he is not bound to allow the precise sums charged.

Rule absolute.

Deere v. Kirkhouse.

DEERE v. KIRKHOUSE.¹

Bail Court, Michaelmas Term, November 25, 1850.

Arbitration — Costs of Reference Costs in the Cause — Application to deduct Defendant's Costs — Sum recovered in the Action — Recital of Date of Writ of Summons in the Issue.

Where a verdict is taken subject to a reference of the action to an arbitrator, who is to certify for whom and for what amount the verdict shall be entered, and the costs of the cause and reference are to abide the event, the costs of the reference are costs in the cause, and follow the legal event of the verdict.

Agreeing to such a reference at *nisi prius* does not preclude a defendant from applying for costs under the 12 & 13 Vict. c. 106, s. 86.

If such an application be successful, the defendant's costs are to be deducted from the amount, exclusive of costs recovered by the plaintiff.

It sufficiently appears that the action was commenced subsequent to the passing of the 12 & 13 Vict. c. 106, if the affidavit of the defendant recite the issue delivered by the plaintiff, and that issue show that the action was commenced subsequent to the passing of the act.

A RULE *nisi* had been obtained, calling upon the plaintiff to show cause why the defendant should not be allowed his costs of suit, to be taxed by one of the masters, and why the plaintiff should not pay the same, after deducting the sum of 7*l.* recovered in the action, or why, in default thereof, the defendant should not be at liberty to issue execution for the same, after deducting such sum as aforesaid, pursuant to the stat. 12 & 13 Vict. c. 106, s. 86.

The affidavits disclosed the following facts: The defendant was a railway contractor, and had employed the plaintiff to do some carting work on the line. The plaintiff, on the 20th of March, 1850, filed an affidavit before the bankruptcy commissioner of the Bristol District Court, under the stat. 12 & 13 Vict. c. 106, s. 78, stating that the defendant was indebted to the plaintiff on a balance of accounts in 128*l.* 8*s.* 11*d.* The defendant denied the amount due, and entered into a bond, with sureties, under sect. 80 of the same statute, to pay such amount as the plaintiff might recover in an action. The present action, debt for work and labor and materials, and for goods sold and delivered, was commenced. The defendant paid 17*l.* 17*s.* 5*d.* into court, and pleaded *numquam indebitatus* and a set-off to the residue. The cause was referred at the trial. The order of *nisi prius* was as follows: "It is ordered by the court, by and with the consent of the parties, their counsel and attorneys, that the jury find a verdict for the plaintiff, debt, 385*l.* 6*s.* 9*d.*, damages, 1*s.*, costs, 40*s.*, subject to the certificate hereinafter mentioned, and that it be referred to the arbitrator, final end, and determination of W. M., Esq., barrister at law, to settle all matters in difference in the said cause between the said parties, and that the said arbitrator shall certify in writing for whom and for what amount, if any, the said verdict shall be entered," &c. "And it is ordered, that the costs of the said cause, and also the

¹ 20 Law J. Rep. (N. S.) Q. B. 195.
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costs of this reference, do abide the event of the said certificate to be taxed by the proper officer."

The arbitrator made a certificate, that, over and above the sum paid into court, the defendant was indebted to the plaintiff in 8*l.*, and that the defendant had a set-off of 1*l.*, and ordered the verdict to be reduced to 7*l.*

It was not stated in the affidavits on what day the action commenced, except that to one of them the issue delivered by the plaintiff was annexed, and in the issue the date of the writ of summons was stated to be the 9th of February, 1850.

Gray showed cause. First, it does not appear that this action was not commenced before the 1st of August, 1850, on which day the act of Parliament, 12 & 13 Vict. c. 106, under which the application is made, was passed. It is true that the affidavit sets out the issue, which states the date of the writ. That, however, is not equivalent to a positive allegation of the fact. Secondly, the reference of the cause at *nisi prius* by agreement of the parties precludes the defendant from making this application. It was agreed by the order of reference that the costs of the cause and reference should abide the event of the arbitrator's decision, and that was made in favor of the plaintiff. Therefore, by the statute of Gloucester, the plaintiff, having recovered damages, is entitled to his costs. The case of *Griffiths v. Thomas*, 15 Law J. Rep. (N. S.) Q. B. 336, on a similar enactment in 43 Geo. 3, c. 46, s. 3, is in point to show that the reference to arbitration precludes the defendant from making this application. The defendant is put in a very different position by the reference than he would have been had the case been decided by the jury. The defendant cannot be entitled to deprive the plaintiff of the costs of the reference, whatever he may be with respect to the costs of the cause. The costs of the reference cannot be separated from the costs of the cause. It is submitted that the facts show that the plaintiff had a reasonable and probable cause for making the affidavit as to the amount of his debt. The expression in stat. 12 & 13 Vict. c. 106, s. 86, "sum received in the action," means the damages and costs, not the damages only; therefore the defendant, if at all entitled, is not entitled to set off his costs against the damages only, but they must be deducted from the amount of damages and costs.

Lush, in support of the rule. It is sufficiently apparent that the action was brought after the passing of the act of Parliament. The affidavit sets forth the issue, which states the date of the writ. The issue is made up by the plaintiff; therefore as against him it must be taken to be correct. The record itself is before the court, and may be inspected by the court. Secondly, the agreement of reference does not affect the defendant's right to make this application under the statute. The costs of the cause and reference are to abide the legal event of the award. That means that the same legal consequences shall follow the event of the award as would have followed the event of the verdict. The 43 Geo. 3, c. 46, which by sect. 3 pro-

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vides, that if the plaintiff does not recover the sum for which he had arrested the defendant, and if the arrest were made without reasonable or probable cause, the defendant shall be entitled to costs, is very analogous to the provision of the statute upon which this application is founded. *Summers v. Formby*, 1 B. & C. 100; s. c. 1 Law J. Rep. K. B. 34; *Summers v. Grosvenor*, 2 Cr. & M. 341; s. c. 3 Law J. Rep. (N. S.) Exch. 61; and *Jones v. Jehu*, 5 Dowl. P. C. 130, show conclusively that the right to apply under that statute is not taken away by a reference to arbitration when the costs are to abide the event of the award. A series of cases to the same effect are collected in Russell on Arbitrators, p. 386. They also show that by the sum recovered the debt or damages only are meant, and not the damages and costs. No difficulty is occasioned with respect to the costs of the reference; for under such a reference as this, the costs of the reference are costs in the cause. *Tregoning v. Attenborough*, 7 Bing. 733. *Taylor v. Lady Gordon*, 9 Ibid. 570. Russell on Arbitrators, p. 370. The facts of the case did not afford the plaintiff any reasonable or probable ground for making an affidavit of debt to so large an amount.

PATTESON, J. With respect to the first objection, that it did not appear that the action was brought after this act came into operation, it appears that the issue in the action was appended to one of the affidavits. It is necessary that the issue should state the date of the writ. As this is made up by the plaintiff himself, and states that the action was commenced subsequently to the act passing, I think that, as against him, it sufficiently appears that the present action comes within this act of Parliament. Secondly, it is said that the effect of the reference at *nisi prius* is to preclude the defendant from making this application. The authorities show that when a verdict is taken at *nisi prius*, subject to a reference of the cause to an arbitrator, who is to certify the amount for which the verdict is to be entered, the costs of the reference are costs in the cause. That being so, it is evident that the costs of the reference in this case must go along with the other costs of the cause, and the costs of the cause are to abide the event, that is, the legal event, of the action. This objection, therefore, cannot prevail. It is then said, that if the application succeed the costs are to be deducted, not from the damages in the action, but from the amount of damages and costs together. The words used in the 12 & 13 Vict. c. 106, s. 86, are very nearly the same words as are used in the stat. 43 Geo. 3, c. 46, and I apprehend that under this, as under that statute, the "sum recovered" must mean the sum recovered by the plaintiff, independently of his costs. At all events, if the construction contended for by the plaintiff's counsel be right, the objection would only arise when the master comes to tax the costs. On the facts disclosed, I do not see that the plaintiff had any reasonable or probable cause for making an affidavit of debt to so large an amount. The rule, therefore, must be made absolute.

Rule absolute.

Hawkins v. Baldwin.

HAWKINS v. BALDWIN.¹

Hilary Term, January 29, 1851.

Witness — Commission to examine — 1 Will. 4, c. 22 — Taxation of Costs — Irregularity — Omission of Time and Place — Irregularity, Waiver of.

The omission to state time and place, both in the order for a commission to examine a witness under the 1 Will. 4, c. 22, and in the commission itself, amounts, at most, to no more than an irregularity. Where, therefore, upon such a defective proceeding being obtained solely at the instance of the plaintiff, the attorneys on both sides had agreed between themselves to a certain time and place, at which the examination under the commission took place, and the witness was then and there cross examined on behalf of the defendant, and afterwards at the trial of the cause, certain letters proved under the commission were put in evidence without objection:—

Held, that the defendant could not take advantage of the defect in the proceedings, so as to deprive the plaintiff of the costs of such commission allowed him upon taxation.

THIS was a rule calling upon the plaintiff to show cause why the master should not review his taxation of costs herein, and why the plaintiff should not repay to the defendant a sum of money, which had been allowed to him under the master's *allocatur*, in respect of the costs of a commission to examine a witness in Ireland.

It appeared from the affidavits that an order had been made by Wightman, J., on the 28th of February, 1850, for the issuing of a commission, under 1 Will. 4, c. 22, at the plaintiff's instance, to examine a witness in Dublin. There was only one commissioner named in that order, and a blank was left for the name of another; subsequently an order of Coleridge, J., was obtained by the plaintiff, under which the name of a second commissioner was added. The defendant refused to join in either order. No particular time or place for the examination under the commission was stated in either order, nor was the omission in that respect supplied in the commission itself. But the attorneys on both sides had, by agreement between themselves, settled a time and place, at which the examination under the commission afterwards took place. Upon such examination all the parties appeared and acted under the commission, the witness being regularly cross examined on the part of the defendant; and at the subsequent trial of the cause, the orders and the commission, and certain letters which had been proved by the witness under the commission, were put in evidence and not objected to. The plaintiff had recovered a verdict at the trial, and afterwards obtained upon taxation the master's *allocatur* for his costs in the cause, including the costs attending the commission, which was objected to before the master on the part of the defendant.

O'Malley and Keane showed cause. The omission in the order and commission of time and place cannot have the effect of rendering the proceedings altogether invalid under the 1 Will. 4, c. 22, s. 4.

¹ 20 Law J. Rep. (N. S.) Q. B. 198.

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The defect at most only amounts to an irregularity, which has been waived by the agreement and consent on the part of the defendant, and his subsequent conduct, both upon the examination under the commission and at the trial. The case of *Greville v. Stulz*, 11 Q. B. Rep. 997; s. c. 17 Law J. Rep. (N. S.) Q. B. 14, differed very materially from this case. There was in that case no such agreement or consent. The defendant, therefore, cannot now object, so as to deprive the plaintiff of the reasonable costs of the commission. They referred also to *Kemmis v. Macklin*, 10 Irish Law Rep. 7.

Willes, contra. The case of *Steinkeller v. Newton*, 1 Sc. N. R. 148; s. c. 9 Law J. Rep. (N. S.) C. P. 262, goes to show, that whether a party joins in a commission or not, he is entitled to notice of the proceedings and to cross examine the witnesses; and in *Greville v. Stulz*, where an objection like the present prevailed, the defendant was served with a copy of the interrogatories and notice of all the proceedings. The right to the costs of the proceeding by commission to examine witnesses depends entirely on the express provision of 1 Will. 4, c. 22, s. 3 and 4, and this commission, in omitting to state time and place, fails to comply with the requirements of the 4th section. Then, as to the point of waiver, this is a question of jurisdiction, and it is not pretended that there was any agreement made to waive all formalities. No more appears in that respect than a statement of what took place before the proceedings were entered upon. This is not like the case of *Nichol v. Alison*, 11 Q. B. Rep. 1011; s. c. 17 Law J. Rep. (N. S.) Q. B. 355. The cross examination was nothing more than the defendant had a right to in defence of himself, whether the commission was regular or irregular. *Greville v. Stulz* is an express authority in support of the objection.

LORD CAMPBELL, C. J. There is no ground for the application. The order in question cannot be said to have been void. At most, the omission to state time and place was an irregularity. It is not, however, necessary that we should inquire whether or not such omission does amount to an irregularity in the proceedings; because, if even it did, still it does not now lie in the mouth of the defendant to object on that ground, after having acted as he did under the commission and at the trial of the cause. Then are these such reasonable expenses as the master ought to have allowed? I think clearly they are, and, therefore, that this rule ought to be discharged with costs.

PATTESON, J. I think it is very material, in proceedings like the present, that the particular place should be inquired into early, and proper that such place should be inserted in the order; but I cannot say that the omission to do so makes the order absolutely void. Then, if that be so, it was at most only an irregularity which the defendant cannot now take advantage of, having afterwards acted under the commission and cross examined the witness. In this respect the case differs from *Greville v. Stulz*, in which the party objecting had not acted under the commission at all.

Hunter v. Liddell.

COLERIDGE, J. I certainly think the commission was irregular, but no more, and that the irregularity has been waived by the conduct of the defendant before the commissioner, and by what took place at the trial afterwards. Suppose a witness were examined by consent of one of the parties, without his having been sworn, (quite as strong a case as this,) it would be in vain for the party consenting afterwards to object to the costs of such witness being allowed.

WIGHTMAN, J. It is difficult to say that there was even an irregularity, as the defendant agreed to a particular time and place before the issuing of the commission; but, be that as it may, I think the irregularity, if any, was waived by the defendant's subsequent conduct.

Rule discharged with costs.

HUNTER v. LIDDELL.¹

Hilary Term, January 31, 1851.

Costs, Taxation of—Witnesses—Travelling Expenses.

Under the directions to taxing officers of Hil. Vac. 4 Will. 4, the allowance to witnesses for travelling is to be the expenses actually paid, not exceeding 1s. per mile, unless under special circumstances:—

Held, that the masters are bound to allow only what has been reasonably expended by the witnesses, not exceeding 1s. a mile, and that they cannot look to what has been paid by the party to the witnesses for their travelling expenses.

A RULE had been obtained in this case to review the master's taxation under the following circumstances: Several witnesses, seafaring men, had been *subpoenaed* by the plaintiff and brought up from Newcastle to London to give evidence upon the trial. The plaintiff had paid to them 1s. per mile as travelling expenses, which had been allowed by the master on taxation. It appeared that the money so paid was about one half more than was sufficient to have paid for the journey and expenses of the witnesses, or than they had actually expended for that purpose. The master considered that, under the directions to taxing officers, Hil. Vac. 7 Will. 4, providing that the allowance to witnesses for travelling shall be "the expenses actually paid, not exceeding 1s. per mile," he was bound to look not to the expenditure of the witnesses, but to what had been actually paid to them by the parties, provided it did not exceed 1s. per mile, and accordingly allowed the payment at that rate.

Sir F. Thesiger and *Atherton* now showed cause, and stated that the masters in all the courts had come to the decision, that the rule of the courts should be construed as had been done in this case, notwithstanding the decision of the Court of Exchequer in *Radcliffe v.*

¹ 20 Law J. Rep. (n. s.) Q. B. 200.

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Hall, 3 Dowl. P. C. 802; s. c. 4 Law J. Rep. (N. S.) Exch. 191; and they further urged that, even if the court should think the existing practice erroneous, and should direct the masters to adopt another course of practice, they would not order a review of the taxation in the present case, where great hardship would be occasioned, the plaintiff having actually paid the money to the witnesses on the faith of the master's construction of the rule.

Humfrey was not called upon to support the rule.

LORD CAMPBELL, C. J. It is quite clear that this rule must be made absolute. I am surprised that the masters should ever have put such a construction upon the directions, or, at all events, should have continued to do so after the decision in *Radcliffe v. Hall*, which expressly warned them that it was improper. They are to see what expenses have been actually paid by the witnesses, but no allowance is to exceed 1s. per mile. They are not to convert a *maximum* into a *minimum*, as has been done here. It is most desirable that this rule should be properly construed and acted upon. We have conferred with all the other judges, and they are unanimous in thinking that the master has put a wrong construction upon this rule, and one which has brought some unmerited obloquy upon courts of common law. The expenses of witnesses must necessarily be often very great, and they must be borne by the losing party, but it is only the reasonable expenses which ought to be costs in the cause. To lay down a rule that 1s. per mile, neither more nor less, shall always be paid, would be most unreasonable, and productive of great hardship. In every point of view it seems to me that we ought to correct this practice. I am sorry that the present plaintiffs should suffer from having paid these costs; but when the question is brought before us, we are bound to direct the master to review his taxation.

PATTESON, COLERIDGE, and WIGHTMAN, JJ., concurred.

Rule absolute.

NEWBOULD v. COLTMAN & another.¹

Hilary Term, January 11, 1851.

Poor-law Commissioners and Poor-law Guardians, Validity of Orders of — Union of Townships — 4 & 5 Will. 4, c. 76, s. 105 — 2 & 3 Vict. c. 84, s. 1 — 5 & 6 Vict. c. 57 — Action against Magistrates — 11 & 12 Vict. c. 44, s. 1 & 2 — Jurisdiction — Trespass or Case.

The poor-law commissioners, in 1837, by an order, directed nine parishes, townships, and places to be formed into a union, called the Pateley Bridge Union, for the administration of the poor laws, and amongst them Bowerley and Dacre, which they treated as two dis-

¹ 20 Law J. Rep. (N. S.) M. C. 149.

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inct townships. They then directed them to contribute to a common fund, for the purpose of providing a workhouse, &c., and afterwards fixed the proportions payable by each township or place, together with the number of guardians to be appointed for each. In 1848, the chairman and guardians of this union made an order on the plaintiff and three others, as overseers of the parish of Dacre cum Bewerley, (treating the two as one township,) for payment of 500*l.* by way of contribution towards the relief of the poor, &c. This order having been disobeyed, the defendants, who were magistrates, issued their summons to the plaintiff and the other overseers as overseers of Dacre cum Bewerley, and afterwards issued a warrant of distress, under which the plaintiff's goods were taken. The defendants tendered evidence that the two places had, from time immemorial, formed one township only. The judge rejected that evidence and directed the jury that the order of the chairman and guardians was not valid, on the ground that the order of the poor-law commissioners, until removed by *certiorari* and quashed, was final as regarded persons acting under it:—

Held, first, that the 2 & 3 Vict. c. 84, s. 1, gave to the magistrates a power similar to that exercised by them in enforcing a legal poor rate. That the existence of a legal obligation to pay the contribution was a necessary preliminary condition to their having any authority to enforce payment; and that, if no such obligation existed, the magistrates had acted without jurisdiction, and were liable in trespass:—

Held, secondly, *dubitante* Alderson, B., that although the order of the commissioners would have been wrong in ordering three guardians to be elected for Bewerley and two for Dacre, instead of five for the entire township if those places constituted one township, still, that the order, until removed by *certiorari* and quashed, was valid *ad interim*, by virtue of the 4 & 5 Will. 4, c. 76, s. 105, and that the acts of the guardians and the order made by them were valid.

TRESPASS for breaking and entering the dwelling-house, &c., of the plaintiff, and seizing his goods. Plea — Not guilty, by statute.

At the trial, before Alderson, B., at the York Spring assizes, 1850, the following were the facts of the case, (as stated in the judgment of the court:)—

This action was brought against the defendants, two magistrates of the West Riding of the county of York, for causing to be seized and sold the plaintiff's goods, under a warrant of distress, signed by the defendants on the 14th of February, 1849, against the goods of the overseers of the poor of the township of Dacre cum Bewerley, for the non-payment of the sum of 500*l.* ordered by the chairman and two guardians of the Pateley Bridge Union to be paid by the overseers of the township of Dacre cum Bewerley.

The order was made at a meeting of the guardians of the poor of the said union on the 16th of December, 1848, on the poor rates of the said township of Dacre cum Bewerley, towards the relief of the poor thereof, as the contribution of the township to the common funds of the union and other expenses that were by the guardians chargeable on the said township. That order was not obeyed. The plaintiff was an overseer appointed for the township. The order having been disobeyed, the two magistrates, the defendant Coltman being one, issued the summons on the 10th of January, 1849, on information and complaint in writing of the chairman of the board of the union, stating the order and non-payment, and calling on the plaintiff and the other overseers to appear at a special sessions at Knaresborough, on the 24th of February, to answer to the information and to be dealt with according to law. The case was adjourned, and after the hearing before the two defendants on the 14th of February, 1849, the defendants issued their warrant of distress, and the goods of the plaintiff were taken. The plaintiff on the trial proved

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the original order of the poor-law commissioners under their hands and seals on the 28th of January, 1837, whereby the Pateley Bridge Union was formed. The commissioners thereby declared that the townships and places, the names of which are specified in the margin of the order, together with all hamlets, tithings, liberties, or other subdivisions lying within or belonging to or adjoining to any of them, should be united for the administration of the law for the relief of the poor by the name of the Pateley Bridge Union, and should contribute in the proportion thereafter to be ascertained to the amount of the average expenditure of the union. In the margin were enumerated eleven townships, first, Bewerley, second, Dacre, third, Menwith with Darley, &c.; and the commissioners ordered that a board should be constituted according to the provisions of the Poor-law Amendment Act, fourteen to be the number of guardians, three for Bewerley, two for Dacre, one for each of the rest.¹ There were always elected for Bewerley three, and for Dacre two, as if they had been separate townships. On the 7th of December, 1841, the commissioners, in pursuance of the 4 & 5 Will. 4, ascertained the expense incurred by each township forming part of the Pateley Bridge Union, and fixed the average of Bewerley at 426*l.*, and Dacre at 297*l.*, treating them as separate townships, and the others at other sums.

For the plaintiff it was contended that the order of the chairman and the guardians was not valid; and that the defendants were not

¹ The following is a copy of the order of the poor-law commissioners: "In pursuance of an act of Parliament passed in the fourth and fifth years of the reign of his present majesty King William the Fourth, intituled 'An Act for the amendment and better administration of the laws relating to the poor in England and Wales,' we, the poor-law commissioners for England and Wales, do hereby order and declare, that the parishes, townships, and places, the names of which and the city, county or counties wherein they are situate are specified in the margin * of this order, together with all hamlets, tithings, liberties, or other subdivisions lying within or belonging or adjacent to any of the said parishes, townships, and places, shall, on the 15th day of February next, and thenceforth shall remain united for the administration of the laws for the relief of the poor by the name of the Pateley Bridge Union, and shall contribute and be assessed to a common fund for purchasing, building, hiring, or providing, altering or enlarging, any workhouse or other place for the reception and relief of the poor of which parishes, townships, and places, or for the purchase of any lands or tenements under and by virtue of the provisions of the said act of or for such union, and for the future upholding and maintaining of such workhouses or places aforesaid and the payment or allowance of the officers of such union, and the providing of utensils and materials for setting the poor on work therein, and for any other expense to be incurred for the common use or benefit, or on the common account of such parishes, townships and places in the proportion of the several sums hereafter to be ascertained and declared by us, the said poor-law commissioners, to be the annual average expense incurred by each such parish, township, or place for the relief of the poor belonging thereto for the three years ending on the 25th day of March next preceding the inquiry. And we do hereby further order and declare, that a board of guardians of the poor of

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|---|-------------------------|-------------------------------|
| * In the West Riding
of the county of
York. | 1. Bewerley. | 6. Upper Stoneback. |
| | 2. Dacre. | 7. Hartwith with Winsley. |
| | 3. Menwith with Darley. | 8. Thornthwaite with Padside. |
| | 4. Fountains Earth. | 9. Thouscross. |
| | 5. Down Stoneback. | |

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entitled to treat the places as constituting one township, on the ground that the order of the poor law commissioners, whereby they were treated as separate, was conclusive of that fact, until removed by *certiorari* and quashed. The learned judge was of this opinion, and ruled accordingly, and rejected evidence which was tendered by the defendants of the places constituting but one township.

The defendants insisted that the action against the magistrates ought to be case and not trespass. The learned judge overruled the objection, and directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a verdict for them or a nonsuit. A verdict was accordingly returned for the plaintiff; damages, 288*l.* 7*s.*

A rule having been obtained accordingly to enter a verdict for the defendants, or a nonsuit, or for a new trial on the ground of misdirection, —

Hall and *J. Addison* showed cause, June 19, 20. First, the order of the guardians, treating the two townships as one, was invalid, for there was much evidence to show that they constituted two townships; and even conceding that in fact they constituted one township only, still the order of the poor-law commissioners, in which they were treated as two townships, is, as against persons acting under it, conclusive of that fact, until removed by *certiorari*. The judge was therefore right in refusing evidence that the two places constituted but one township. All the cases as to uniting parishes in unions are collected

the said union shall be constituted and chosen according to the provisions of the Poor-law Amendment Act, and in manner hereinafter mentioned."

Then followed several directions, the heads of which are as follows: —

1. Number and constituency of guardians.
2. Duration of office.
3. Qualification of guardians.
4. Qualification of voters for guardians and scale of voters.
5. Days of election.
6. Notice of election.
7. Mode of proposing a guardian.
8. Mode of election.
9. Notice of appointment and return of guardians.
10. The first meeting of guardians.

(Signed by the poor law commissioners.)

The following is the copy of the order of the board of guardians: —

"To Messrs. James Challonsworth, *Edward Newbould*, Thomas Stoney, and William Kirkbride, overseers of the parish of Dacre cum Bewerley.

"You are hereby ordered and directed to pay to Mr. John Ingleby, of Pateley Mills, on behalf of the guardians of the poor of the Pateley Bridge Union, on Saturday, the 23d day of December instant, at his residence, the sum of 500*l.* from the poor rates of the parish of Dacre cum Bewerley towards the relief of the poor thereof, and to the contribution of the parish to the common fund of the union and such other expenses as are chargeable by the said guardians on the said parish, and to take the receipt of the said Mr. John Ingleby indorsed upon this paper for the said sum of 500*l.*

"Given under our hands at a meeting of the guardians of the poor of the said Pateley Bridge Union held on the 16th day of December, 1848.

"JOHN YORK, Presiding Chairman.

"HENLEY HUTCHINSON, } Guardians."
 "WILLIAM FOSTER, }

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in Archbold on the Poor Laws, p. 20. They cited as to this point 5 & 6 Vict. c. 57, s. 13, and *The Queen v. The Governor, &c., of the Poor of Bristol*, 18 Law J. Rep. (N. S.) M. C. 132. Secondly, the defendants in making the order in question acted in a matter over which they had no general jurisdiction, and therefore are liable in an action of trespass, and are not within the 1st section of the 11 & 12 Vict. c. 44, which enacts that any action brought against any justice of the peace for any act done in the execution of his duty, with respect to any matter within his jurisdiction as such justice, shall be an action on the case. They cited the stat. 2 & 3 Vict. c. 84. The Rules of the Poor Law Commissioners. Archbold on the Poor Laws, 263. *Windham v. Clere*, Cro. Eliz. 130. *Morgan v. Hughes*, 2 Term Rep. 225. *Gerlington v. Pitfield*, 2 Keb. 572. *Burley v. Bethune*, 5 Taunt. 580. *Jones v. Gurdon*, 2 Q. B. Rep. 600; s. c. 11 Law J. Rep. (N. S.) M. C. 45. *Massey v. Johnson*, 12 East, 67. *Lowther v. Earl of Radnor*, 8 Ibid. 113. *Lancaster v. Greaves*, 9 B. & C. 628; s. c. 7 Law J. Rep. M. C. 116. *The Queen v. Thorogood*, 12 Ad. & E. 183; s. c. 9 Law J. Rep. (N. S.) Q. B. 211. *Thompson v. Ingham*, 19 Law J. Rep. (N. S.) Q. B. 189. *The Queen v. Hinde*, 5 Q. B. Rep. 944; s. c. 13 Law J. Rep. (N. S.) M. C. 150. *Nichols v. Walker*, Cro. Car. 394. *Milward v. Caffin*, 2 Wm. Black. 1330. *Morrell v. Martin*, 4 Sc. N. R. 300; s. c. 11 Law J. Rep. (N. S.) M. C. 22. *Wilkins v. Hemsworth*, 7 Ad. & E. 807; s. c. 7 Law J. Rep. (N. S.) M. C. 28. *The King v. Uloxeter*, 2 Stra. 932. *In re the Constables of Hipperholme*, 5 Dowl. & L. P. C. 79. *The King v. Lloyd*, Cald. S. C. 309. *The King v. Lediard*, Sayer, 6. *Ex parte Taunton*, 1 Dowl. P. C. 54. *The Queen v. Coles*, 8 Q. B. Rep. 75; s. c. 15 Law J. Rep. (N. S.) M. C. 10. *Skingley v. Surridge*, 11 Mee. & W. 503; s. c. 12 Law J. Rep. (N. S.) M. C. 122. *Harper v. Carr*, 7 Term Rep. 270. *Painter v. The Liverpool Gas Company*, 3 Ad. & E. 433; s. c. 5 Law J. Rep. (N. S.) M. C. 108.

Pashley, in support of the rule. First, the order of the chairman and guardians was good, and the learned judge was wrong in refusing evidence that the two places formed but one township. Secondly, if those two places did not form part of the union, the defendants had a jurisdiction to determine whether the persons named as overseers of one township were liable to pay the amount ordered by the guardians to be paid; and that, if they were in error, they were not liable to be sued in trespass; but having a general jurisdiction, they were liable to be sued in case only. He cited, *The Queen v. Bolton*, 1 Q. B. Rep. 66; s. c. 10 Law J. Rep. (N. S.) M. C. 49. *Cave v. Mountain*, 1 Sc. N. R. 132; s. c. 9 Law J. Rep. (N. S.) M. C. 90. *Allen v. Sharp*, 2 Exch. Rep. 352; 17 Law J. Rep. (N. S.) Exch. 209. *Robinson v. Lenaghan*, Ibid. 333; s. c. 17 Law J. Rep. (N. S.) Exch. 174. *The Queen v. Clayton*, 18 Law J. Rep. (N. S.) M. C. 129. *The Queen v. Tadmorden*, 1 Q. B. Rep. 185; s. c. 10 Law J. Rep. (N. S.) M. C. 65. *Garnett v. Ferrand*, 6 B. & C. 611; s. c. 5 Law J. Rep. K. B. 221. *Fawcett v. Fowlis*, 7 Ibid. 394; s. c. 6 Law J. Rep. M. C. 44. The stat. 11 & 12 Vict. c. 44, s. 4. *Yorke v. Brown*, 10 Mee. & W. 78; s. c. 11 Law J. Rep. (N. S.) Exch. 410. *The Queen v. Buckingham-*

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shire Justices, 3 Q. B. Rep. 800 ; s. c. 12 Law J. Rep. (N. S.) M. C. 29. *Ormerod v. Chadwick*, 16 Mee. & W. 367 ; s. c. 16 Law J. Rep. (N. S.) M. C. 143.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

PARKE, B. [After stating the facts of the case, his lordship proceeded.] On the part of the plaintiff, it was alleged, that the two places constituted separate townships, and much evidence was given to prove it; and it was contended that if they were, the order on the overseers of the townships as consisting of both places was void; and, further, that if they really did not constitute two townships, the order of the commissioners of the 28th of January, 1837, and the 7th of December, 1841, until removed by *certiorari* and quashed, was conclusive that they were two townships, and that all persons acting under these orders, including the defendants, could not, while they subsisted, treat the two places as one township. On the other hand, the defendants insisted, first, that if the two places really constituted one township, the orders were still effective to make that township a part of the union, and the apportionment of the expenses and the consequent order on the overseers to pay failed. Secondly, that if they were not, the defendants, as magistrates, had a jurisdiction to determine whether the persons named as overseers of one township were liable to pay the amount ordered by the chairman and two of the board to be paid, and that if they did so determine, although their decision was wrong, yet they were not liable in an action of trespass for putting in force that decision. And, thirdly, that at all events they acted with respect to a subject within their general jurisdiction, and were thereby liable only to an action on the case, and protected against this action of trespass by the 11 & 12 Vict. c. 44, s. 1. All the three questions are of importance, and were very elaborately argued before us, and we have taken time to consider them, as they have not been free from doubt, nor free from difficulty. It will be convenient to dispose of the two last questions in the first instance.

As to the second question, the point to be determined is, whether the magistrates who were applied to to issue their warrant of distress had power to inquire into—see *The Queen v. Bolton*—and decide upon the validity of the order of the chairman and two of the board of guardians. If they had, the propriety of their decision could not be disputed in the action. The question depends upon the construction of the act under which the warrant was issued, the 2 & 3 Vict. c. 84, s. 1. That act provides, “that in every case in which any contribution by overseers or other officers of any parish of moneys required by the board of guardians or persons acting as guardians for such parish or for any union which shall include such parish,” (the interpretation clause including the word “township or any other district” under the term “parish,”) “shall be in arrear, it shall be lawful for any two justices acting within the district

¹ PARKE, ALDERSON, ROLFE, and PLATT, BB.

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wherein such parish shall be situate, on application under the hand of the chairman or acting chairman of such board, to summon the said overseer or other officer to show cause, at a special sessions to be summoned for the purpose, why such contribution has not been paid; and, after hearing the complaint preferred under the authority of such chairman, or acting chairman, or on behalf of such board, if the justices at such sessions shall think fit, by warrant under their hands and seals, to cause the amount of the contribution so in arrear, together with the costs occasioned by such arrear, to be levied and recovered from the said overseers or other officers, or any of them, in like manner as moneys assessed for the relief of the poor may be levied and recovered." The simple question is, whether in this enactment the legislature intended the magistrates to determine whether the persons named as overseers had been guilty of a violation of their duty in disobeying the order, and whether the performance of it could be enforced,—in which case they would be in the same position as if they were adjudicating upon a charge of an offence imposing a penalty; or whether the intention of the statute was merely to enable them to levy the sums legally due by virtue of the order, giving them a discretionary power to grant or refuse their warrant according to the circumstances,—in which case they would be precisely in the same situation as magistrates granting a warrant of distress to levy an ordinary poor rate. As in that case of a valid poor rate, the liability of the parties proposed to be distrained to pay a sum rightly imposed would be essential to give validity to the act of the magistrates, the magistrates not acting under an inquiry into the validity of the rate judicially, so in this case, a valid order upon overseers, who are bound to obey it, would be essential to give the magistrates authority to issue their warrant. We think the legislature meant to give to the magistrates, by the statute, a power similar only to that which they exercised in levying a poor rate. The language of the section does not in express terms require them to adjudicate upon the question, whether the contribution is legally due and in arrear or not. On the contrary, according to the ordinary construction, it authorizes the magistrates to deal only with the contributions which are in arrear, and which are alleged to be so. And, although this phraseology sometimes occurs in statutes which clearly mean to give the magistrates jurisdiction to inquire whether the fact is so or not, as, for instance, where a statute says, "If any person commits such an offence, he shall incur a penalty to be recovered before a magistrate," yet the form of expression is by no means immaterial, nor does the statute require any conviction, or order, or act of jurisdiction at all, but simply a warrant of distress. And although there are cases in which a warrant may be the only instrument which the legislature requires, yet the magistrates in granting it may act judicially. See the case of *Lindsay v. Leigh*, 17 Law J. Rep. (N. S.) M. C. 50, and the cases there referred to. This circumstance also affords an argument against the construction that it gives to the magistrates jurisdiction to inquire into and decide the matter now in question. If we add to this the recital and conclusion of the 1st section, we are satisfied that the

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legislature meant merely to give to two magistrates the same power of enforcing a legal obligation to contribute as a magistrate had previously to enforce a legal poor rate against a person legally liable, and the only matter left for the decision of the magistrates is, whether they should, under the circumstances of each case, among others, the fact whether the overseers had a right to have had money in hand out of the poor rates, allow the overseers to be distrained upon or not. The existence of a legal obligation to pay the contribution is, therefore, a necessary preliminary condition to the magistrate having any authority at all in this case to enforce it. This conclusion disposes of the second question argued before us, and upon which point my brother Alderson gave leave to move to enter a nonsuit, namely, whether the defendants were liable only in an action on the case by virtue of the 11 & 12 Vict. c. 44, s. 1. That section provides, "That every action that shall hereafter be brought against any justice of the peace for any act done by him in execution of his duty as such justice, in respect of any matter within his jurisdiction as such justice, shall be an action upon the case as for a *tort*, and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable or probable cause." The 2d section provides, that for every act done in any matter in which they have not a jurisdiction, the form of action shall be trespass. If there was not a legal obligation on the overseers of Dacre cum Bewerley to pay the contribution ordered by the defendants to be levied by distress, the defendants, the magistrates, acted without jurisdiction, and were not entitled to the benefit of the section, and were liable to an action of trespass. The rule, therefore, to enter a nonsuit must be discharged.

The principal question, then, remains to be considered; that is, whether the order on the overseers of the said township to pay the sum of 500*l.* was valid. The learned judge thought it was not, even although it should be proved that the two places constituted one township, of which evidence was offered by the defendants; and in considering whether he was right or not in that opinion, we must presume they did prove it. The objection to its validity is, that the orders of the commissioners must be considered as valid until removed by *certiorari*; and that, assuming them to be valid, each part must be treated as a township, and the overseers of a township so constituted of two places were not and could not be bound to pay the sum demanded. We have no doubt that the order of the commissioners was, as the learned judge thought, valid, and must be acted upon until removed and quashed. But the question is, whether so treating it, the township of Dacre cum Bewerley, being one township, is not operated upon by it and made a part of the union, and rendered liable to contribute. It is clear that by the statute 4 & 5 Will. 4, c. 76, s. 26, the commissioners have a power to unite entire parishes or townships, only they could not divide them into separate divisions, nor unite the part of one with others, so as to constitute a union. It is also clear that the commissioners, always assuming, as we must for the present purpose, that the two places, Dacre and Bewerley, formed one township, made a mistake in supposing them

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to be two townships. Unquestionably they meant that the district called Bewerley and the district called Dacre were to be part of the union; and we do not see why the order should not have the effect that they meant. It is our duty to construe it so as to give it, when applied to the facts, the effect that was intended, if we can; and we must act upon the legal maxim that we must construe *ut res magis valeat quam pereat*. If the commissioners had said, "We do not know whether this district of Bewerley and Dacre form one or two townships, but, whether they be one or the other, we direct them to form part of the union," we think the order would have been so far unquestionably valid; and we think it clear, although they thought them to be separate, that they meant these places to be united if they were not. But then it is said, that the order is bad in that part in which it directs three guardians to be elected for one place and two for the other, if they constitute one township; for the commissioners have no power to order guardians to be elected for one part of a township only, under sect. 38, and they probably have not. But is that fact to render the whole order a nullity? We think it is not, because it is valid, notwithstanding this defect, until it is removed and quashed for that defect. See sect. 105. And if carried into effect pursuant to the directions contained in it, the acts of the guardians in the mean time are good in law—a very important and necessary provision to prevent the beneficial effects of the new arrangement for the better administration of the poor laws being suspended, while it gives to the parties aggrieved, and who no doubt are aggrieved by the error or wrong, a full opportunity of relieving themselves. The clauses in the 5 & 6 Vict. c. 57, s. 12, 13, and the 10 & 11 Vict. c. 109, s. 25, relied upon in the argument to cure the defect, while they show strongly the intention of the legislature to give intermediate operation to all the provisions of that statute, appear to us to apply to neglects on the parts of the parishes or townships to act according to the commissioners' orders, and not to defects in the order itself. They indicate the intention of the legislature not to throw impediments in the way of the speedy and practical effect of the measure. The defects in the order itself seem to us, upon consideration, to be cured by the 4 & 5 Will. 4, c. 76, s. 105, which makes the order valid *ad interim*. We think, therefore, that although the order would have been wrong in ordering three guardians to be elected for Bewerley and two for Dacre, instead of five for the entire township, if they constitute one township, that error will not prevent the order from operating in the mean time; and while it does operate, the township of Dacre cum Bewerley is part of Pateley Bridge Union. But, then, if the apportionment had been wrong, and the amount to be paid by that township could not have been ascertained, this would have been a difficulty not to be surmounted, for the township is bound to pay that proportion only which the commissioners find was the proportion. This difficulty would have occurred if the commissioners had fixed the amount to the joint township and the district had consisted of two separate townships. But as they have fixed the amount of each, there is no difficulty in

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ascertaining what is due from both by adding them together. We think, therefore, that the order is valid for the present, and for these reasons are of opinion that there should be a new trial.

ALDERSON, B., said, I do not differ from the court on the first two points, but I confess I at present entertain considerable doubt as to the third, and hope it will be put upon the record, if the case goes down again. I think the order of the commissioners is not valid, unless the places are treated as two separate townships; because, if they are treated as one township, the order of the commissioners for uniting two separate townships, with a condition that one township shall have no separate guardians at all, is, in my opinion, an invalid order.

Rule for a nonsuit discharged, and rule absolute for a new trial.

REGINA v. THE SOUTHAMPTON DOCK COMPANY.¹

Hilary Term, January 22, 1851.

Poor Rates, Liability to — Southampton Dock Company — Construction of 13 Geo. 3, c. 50, s. 25 — Ratable Value — Proper Deductions — Expenses of Steamtug — Allowance to Directors — Ponderous Machinery attached to Freehold — Income Tax.

The Southampton Dock Company's premises consisted in part of the custom-house, rented and occupied by her majesty's commissioners of customs, and a manufactory and several workshops, rented and occupied by the West India Mail Packet Company, and J. W. The company under the 188th section of the Dock Act, which empowered them to build or provide out of their income steamtugs for towing vessels into or out of the docks, from or to Southampton, or to any part of the British Channel, had actually in use a steamtug, which offered considerable advantage to those who used the docks, and was conducive to the general profits of the dock business. It was not, however, indispensable, as other steamboats might have been hired at Southampton for the same purpose, but at less advantage and convenience both to the company and those using the docks. Attached to the freehold, and essential to the business of the company, was certain fixed plant, consisting of cranes, steam engines, shears, derricks, dolphins, and other like ponderous machinery; which, however, were capable of being detached, as easily and with as little injury to the freehold as tenants' fixtures put up for the purposes of trade and business, and usually valued as between incoming and outgoing tenants:—

Held, upon a case stated as to the extent of the company's liability to be rated to the relief of the poor, —

First, that the 25th sect. of the 13 Geo. 3, c. 50, "for the better regulating the poor, &c., of Southampton," and which provided that every person, whether the landlord or tenant, who should let out his house in separate apartments, or ready furnished to lodgers, should for the purposes of the act be deemed the occupier and liable to be rated, did not apply to the part of the company's premises of which they were not the occupiers.

Secondly, that the steamtug must be taken as ancillary to the docks, and a part of the floating capital, and that the expenses of it was a proper deduction to be made, in estimating the amount of the company's assessment to the rate.

Thirdly, that as an allowance to directors for management, another proper deduction to

¹ 20 Law J. Rep. (n. s.) M. C. 155. 15 Jur. 268.

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be made was a reasonable amount of remuneration for personal trouble and expense, and for the exercise of the skill and judgment of a supposed lessee of the company in managing the affairs of the docks, independently of the profit on capital employed by him.

Fourthly, that the cranes, steam engines, and other ponderous machinery were properly included in estimating the ratable value of the company's premises.

Fifthly, that no deduction could be made for income tax, in respect of the estimated profit of a supposed tenant of the docks, that not being a tax upon the subject matter rated, but upon the net income of the tenant after paying the rent of the premises.

ON appeal at the Easter Quarter Sessions, 1849, for the town and county of Southampton, against a rate for the relief of the poor within the said town and county, to which the Southampton Dock Company was assessed in the entire sum of 4071*l.* net estimated rental or ratable value, in respect of the docks and various buildings, warehouses, stores, workshops, steam engines, waterworks, machinery, yards and buildings, belonging to the said company, the recorder reduced the amount of such assessment to 3750*l.*, subject to the opinion of the Court of Queen's Bench on the following case:—

The Southampton Dock Company was incorporated by stat. 6 Will. 4, c. 29, amended by 1 & 2 Vict. c. 62, 6 & 7 Vict. c. 65, and 8 & 9 Vict. c. 23, and under the provisions and restrictions of these statutes (copies of which are to be referred to as part of this case) the company proceeded to make the docks and premises included in the rate, and to take toll, &c., and the business of the docks is now carried on under these acts. In the assessment on the company, certain parts of the above premises, belonging to the company, but exclusively used and occupied by other persons, were included, and as to these the Court of Quarter Sessions adjudged that the dock company was not ratable in respect of them, but only for the docks and other premises occupied by the company. The following are the particulars of the premises so used and occupied by other persons: that is to say, the custom-house, with the appurtenances, leased to and in the occupation of her majesty's commissioners of customs, at the rent of 500*l.* 10*s.*; a manufactory, rented and occupied by the West India Mail Packet Company, at the rent of 440*l.*; sundry workshops, in the occupation of J. White, at the annual rent of 75*l.* All these premises, except the custom-house, are within the general outer enclosure of the dock company's premises. The custom-house itself is built on the land taken by the dock company, under the powers of one of the above-mentioned acts, but it is without the enclosure. The customs' watch-house is within the enclosure, and both are let at an entire rent to the commissioners of customs. It was proved that the dock company had demanded from the West India Mail Packet Company the poor rates due in respect of that portion of the dock premises so occupied by them; and it was contended by the respondents that the dock company was ratable for all the above premises, and they referred to the following clauses of a local act, 13 Geo. 3, c. 50, being "An Act for the better regulating the poor, and repairing the highways within the town and county of the town of Southampton," (a copy of which act is to be referred to as part of this

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case.) Sect. 25 of this act, after reciting that divers houses are let out as separate apartments and distinct tenements, and others are let ready furnished, and that divers persons have let tenements, built on ground appurtenant to their principal dwelling, to strangers and others unable to pay rates, or improper to be rated, whereby the payment of rates may be evaded, &c., provides that every person, whether landlord or tenant, who shall let out his house in separate apartments, or ready furnished, to lodgers, or who shall have let any such buildings as aforesaid, shall, for the purposes of that act, be deemed to be the occupier thereof, and such landlord or tenant, or any or either of them, at the discretion of the said guardians, may be rated accordingly, and shall be liable and subject to the payment of the sum so assessed. And by the 26th section of the same act, the goods and chattels of every person renting or enjoying any such separate apartment in such house, or renting or occupying any such ready furnished or any such tenements, are liable to be distrained for payment of the said rate, and the amount so paid or levied may be deducted out of the next rent due to the landlord. As to the residue of the property in the occupation of the appellants, their revenues are derived under the provisions of their acts from tonnage, dues, rates on exports and imports, warehouse and wharfage rents, payments for using graving or dry docks, and tolls paid by passengers landing or embarking at the docks; and all these payments accrue either in respect of the use of the company's premises, or for work done by the company's servants and workmen for those who use them.

Both parties agreed as to the principle of rating — that is to say, that the net annual receipts of the company should be taken, without allowing interest on the original outlay in forming the docks, or on subsequent loans for the enlargement and completion of them; and after deducting therefrom interest on the capital necessary for carrying on the business of the company, tenants' profits, the taxes, and the estimated annual expenses of repairs and renovations, that the residue was the ratable value. The difference between the parties arose on some of the items of disbursement and deduction claimed by the appellant. The following is the short statement of receipts and deductions, as allowed by the court:—

The gross receipts for the year, and exclusive of the rent of the premises ratable separately,	£20,600
Disbursements during the same year, including expenses of a steamtug, direction, insurance, local rates, &c., . . .	10,300
Net receipts,	10,300
Further deductions, claimed and allowed, were, capital necessary for carrying on the company's business — that is to say, movable plant, . . .	£6,900
Coals in store, materials, and cash balance, . . .	8,100
Total amount of capital,	15,000

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On which last amount the court allowed, under the special circumstances of the case, 5 <i>l.</i> per cent. interest, and 20 <i>l.</i> per cent. for tenants' and trade profits,	£3,750
Estimated annual expense of repair and renovation of movable plant,	845
Estimated annual expense of repair and renovation of fixtures, or fixed plant, described hereafter, . .	390
Annual repair and maintenance of the freehold premises occupied by the company, exclusive of the above fixtures,	1,565
Total deductions,	£6,550
Net ratable value in the hands of a tenant,	£3,750

To which last amount the rate was reduced by the court. The respondents objected to any deduction for disbursements in respect of the items of steamtug and direction. As to the steamtug, for the expenses of which the court allowed 778*l.*, it appeared that one had been and was actually in use by the dock company for the purposes of the docks, and the company are empowered, by the 188th section of the Dock Act, to build or provide, out of the income of the company, steamtugs, for the purpose of towing any vessels into or out of the docks, from or to Southampton, or to any part of the British Channel. The steamtug offers considerable advantages to those who use the docks, and may be fairly considered as a useful appendage to the docks, and conducive to the general profits of the concern. It was not indispensably necessary, inasmuch as the duty might have been done by hiring other steamboats at Southampton for each occasion, but at less advantage and convenience, both to the company and the public using the docks. The value of such a tug is to be taken at 2500*l.*, and is included in the estimated value of the movable plant hereinbefore mentioned. The actual receipts or earnings of it for the year are included in the above statement of the general receipts of the company, and amount to 616*l.* As to direction, this was a sum of 1000*l.* heretofore paid to the directors under the Dock Act, as a personal remuneration for managing the business of the company. The dividends of the company being small, the directors had, in fact, waived and declined to receive any remuneration for the last year before the assessment. The sum was allowed by the sessions as a reasonable remuneration for the personal trouble and expense, and for the exercise of the skill and judgment of a supposed lessee of the company, in managing the affairs of the docks, independently of the profit on capital embarked by him.

In addition to the deductions allowed by the court, the appellants claimed two further deductions: they contended that certain fixtures or fixed plant, consisting of cranes, steam engines, shears, derricks, dolphins, and other like ponderous machinery attached to the freehold, and essential to the business of the company, should be taken into account in estimating the rent, as fixtures for which a tenant

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would be required to pay on taking possession of the premises, and ought to be treated as personal stock in the nature of stock in trade, and part of the capital which a tenant would have to invest in the business; that, if so considered, such fixtures would diminish instead of increase the ratable value of the property of the company. The fair value of the fixtures, if purchased by an incoming tenant, would be 6550*l.*; and the sessions find as a fact, that the fixtures in question were attached to the freehold, but are capable of being detached from the freehold as easily and with as little injury to it as other fixtures put up for the purposes of the trade or business of the tenant, and usually valued as between incoming and outgoing tenants. If those fixtures ought to be regarded as stock in trade or personal stock, then the appellants are entitled to the same deduction in respect of interest and tenants' profits as on the sum of 15,000*l.* above mentioned.

The appellants further claimed to deduct 155*l.* per annum for income tax, and they claimed this deduction, not in respect of the amount of the tax actually paid by them as owners of the premises, but in respect of the estimated profit or income of the supposed tenant of the dock company; contending that the tax would operate to diminish the rent which a tenant would agree to pay. The sessions held, that the tax, being on the income of the lessee, over and above the rent paid for the premises by which his profits are earned, could not affect the rent, and disallowed the deduction. The respondents did not object to the amount of this deduction, if allowed at all, and no point was raised on the effect of the payment of the tax by the company, under Schedule (A) of the Income-tax Act.

The points in difference between the parties, submitted to the judgment of this court, are, therefore, as follows: On the part of the respondents — first, that the dock company was properly assessed for the premises hereinbefore described as occupied by other parties; secondly, that the expenses of the steamtug ought not to have been allowed; thirdly, that the deduction under the head of Direction ought not to have been allowed. On the part of the appellants — first, that the fixtures or fixed plant of the company, as above described, ought to have been considered as capital or stock in trade; secondly, that the income tax on the tenant's income or profit ought to have been deducted. The rate, as amended by the sessions, is to be raised, or further reduced, amended, confirmed, or referred back to the sessions, as this court shall think fit.

A rule having been obtained, calling upon the overseers of the poor of Southampton to show cause why the rate should not be amended, by further reducing the assessment made upon the said dock company, —

M. D. Hill and *Massey*, for the respondents, showed cause, (November 16.) This rule calls upon the respondents to say why the rate should not be further reduced. They ought not, therefore, to be called upon to begin now, because what has been done is in their favor.

[*Lord Campbell*, C. J. The rule is, that the party called upon to show cause ought to show cause.]

Then the first objection is, that the premises which are in the occupation of other parties are ratable to the dock company. But it may not be necessary for the court to decide this point.

[*Lord Campbell*, C. J. Can we adjudge how the rate is to stand without giving our opinion on that point?]

The court cannot increase the rate beyond 4071*l.*, and if it comes to that, in other points it is sufficient. The question is, whether a custom-house in possession of the queen is not within the clause of the stat. 13 Geo. 3, c. 50, s. 25, which applies to property in possession of "persons improper to be rated." Secondly, the expenses of the steamtug ought not to have been allowed as a deduction, viz., 25*l.* per cent. on its value, which was assumed to be 2500*l.* The earnings of the steamtug, which were 616*l.*, are allowed in favor of the parish. The difference is allowance for reducing property of the dock company. By the act of Parliament, 6 Will. 4, c. 29, the dock company is permitted to embark in trade by keeping steamtugs. Such employment is collateral to the business of the dock company, and cannot, for purposes of rating, be combined with it. The tug is not a necessary appendage to the enjoyment of the dock. A tenant might conduct the business of the dock without the convenience of the tug, and the supposed rent for the purposes of rating is not necessarily to be estimated in proportion to all the profits actually made. The fact of the dock company being allowed to carry on any trade by statute cannot affect their quantum of rate. If the gains from the tug had been much greater than the expenses, could the ratable value be thereby increased?

[*Lord Campbell*, C. J. If vessels could not be brought into dock without the aid of a steamtug, it becomes ancillary, to the business of the dock, and, surely, the expense should be deducted.]

That is not found, and, besides, a distinct payment is made for the tug on each occasion of towing vessels into the dock. Suppose an individual occupier of the dock instead of a company, could his gains by the business of a carrier to or a trade within the docks be taken to eke out the ratable value of the dock? A carriage wagon to London would be a convenience, in respect of which the company might equally claim a deduction.

[*Lord Campbell*, C. J. Would not that be a useful appendage?]

It might be; but could the company be rated upon profits earned in that way in different parishes? or, in this case, can earnings of the tug at the mouth of the river be included in the ratable value?

[*Lord Campbell*, C. J. In renting the dock, a tenant could take into account the receipts and disbursements of the steamtug.]

The case of *The Queen v. The Great Western Railway Company*, 6 Q. B. Rep. 179; s. c. 15 Law J. Rep. (N. S.) M. C. 80, applies here. A deduction was claimed in that case for the loss on branch lines, which were worked solely on account of the increased traffic to the principal line, and was disallowed.

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[*Lord Campbell*, C. J. Here the steamtug is never employed, except when a vessel is towed into or out of the dock.]

But the employment of it is merely accidental. Other tugs might be employed. Then as to the allowance in respect of direction. The duties performed are such as a tenant could not hire persons to do. It is in effect an allowance of 1000*l.* a year for what a tenant himself must do in managing the affairs of the dock. The case of *The Queen v. St. Giles, Camberwell*, 19 Law J. Rep. (N. S.) M. C. 122, is directly in point to show that such an allowance ought not to be made. Next, as to the deduction for machinery. Upon no principle can the deduction be made. The machinery is necessary for the use of the dock premises, and increases the value of the occupation, and it is clear that fixtures of that nature form part of the ratable value. *The King v. Lord Granville*, 9 B. & C. 188; s. c. 7 Law J. Rep. M. C. 89. *The King v. The Birmingham and Staffordshire Gas Light Company*, 6 Ad. & E. 634; s. c. 6 Law J. Rep. (N. S.) M. C. 92. Lastly, as to the claim for income tax. That is a tax assessed upon clear profits, and, therefore, the claim clearly cannot be allowed.

[*Lord Campbell*, C. J. It is supposed to be paid out of the clear income which, but for the tax, the person would have to spend.]

Just so. The only shadow of authority for the allowance are the rather obscure observations in *The Queen v. The Great Western Railway Company*.

Greenwood, Sanders, and Wise, contra. The recorder has come to a very proper decision in making the deductions.

[*Lord Campbell*, C. J. You may, I think, begin with the deduction in respect of the steamtug.]

Then, clearly, that is a proper deduction. The questions here must be decided *rebus sic stantibus*, and from the facts found, it would appear to be necessary to the enjoyment of the dock to have the steamtug. But it is not necessary to go to that extent, as under the Dock Act if the tug is used, as it clearly is, for ordinary purposes and the general advantage of the business of the dock, the deduction has been properly made. As to the expenses of direction, but for the case of *The Queen v. St. Giles, Camberwell*, the right to an allowance in that respect would have been considered clear, and that case is distinguishable from this. There the expenses of direction were necessary only for the convenient management of the company, irrespective of the value of the premises, which could be rated without any reference whatever to the direction, and had no relation to what would be the ordinary duties of a lessee. Here, the duties are very multifarious, and relate to the superintendence of the business going on in the dock itself. Remuneration to directors, therefore, is a necessary expense. The company are to be treated as if they were tenants, and it is not to be assumed that a tenant could himself perform all the duties.

[*Coleridge*, J. Does it amount to more than that a certain number manage the company for themselves and the others interested, and is

not the allowance made for tenants' profits in part referable to the skill used by the tenant?]

If the tenant principle is to be applied, and it must be so, the court must consider that no one man could perform the duties of the direction, and therefore that other persons than members of the company might be employed.

[*Coleridge, J.* Suppose just sixteen persons became tenants of the dock, could they deduct 1000*l.* for their skill and attention? Is it not, after all, a payment for the management of the company?]

The company's act requires directors should be employed and paid, and the company must submit to do so. Suppose each director held one particular office, there could be no doubt about the deduction then, and the mere difference in name cannot alter the right. This is like the case of a partnership in which the active partner is entitled to receive a remuneration for his services, or where a head bailiff is employed, or in the case of tolls, where there is a manager or collector of the tolls. *The King v. The Oxford Canal Company*, 10 B. & C. 163; s. c. 8 Law J. Rep. M. C. 62. Then, as to the allowance for fixed capital, a doubt certainly is raised by the authorities, but the point is by no means satisfactorily settled. The cases of *The King v. The Birmingham and Staffordshire Gas Light Company*, and *The Queen v. Guest*, 7 Ad. & E. 951; s. c. 7 Law J. Rep. (N. S.) M. C. 38, have been erroneously supposed to be founded one upon the other. A tenant might take the premises at their value without the fixtures, and surely he is not to be rated according to the value of expensive fixtures, which might bear no sort of proportion to the rent that he actually pays. Now that steam power and large machinery are so much more used than when those cases were decided, it is of extreme importance that this question should be fully considered. Before those cases, the ratable subject matter was always considered to be what is termed landlord's property, and there the words of the Parochial Assessment Act, as to the deduction of expenses, were not sufficiently looked to. This observation applies equally to the claim in respect of direction. Lastly, as to the income tax; the appellants only seek to deduct the income tax upon a tenant's share of the profits. Like any other tax, a tenant would consider such deduction in renting the premises. The decision in *The Queen v. The Great Western Railway Company* is almost express upon this point. They referred also to *The Queen v. Mile End Old Town*, 10 Q. B. Rep. 208; s. c. 16 Law J. Rep. (N. S.) M. C. 184.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

LORD CAMPBELL, C. J. The first question which arose in this case was, whether the appellants were liable to be rated to the relief of the poor in respect of certain premises of which they are the owners but not the occupiers, viz., the custom-house in the occupation of her majesty's commissioners of customs at the rent of 500*l.* 10*s.* a year,

¹ LORD CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, JJ.

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a manufactory in the occupation of the West India Mail Packet Company at the rent of 440*l.* a year, and several workshops in the occupation of J. White at the rent of 75*l.* a year. The liability of the appellants to be rated for these premises was rested on a local act of Parliament, 13 Geo. 3, c. 50, for regulating the poor in Southampton, which, to remedy the inconvenience produced by persons letting small tenements to strangers and others unable to pay rates, enacts, that every person who shall let out his house in separate apartments, or ready furnished to lodgers, or shall so let tenements built on ground appurtenant to his principal dwelling house, shall, for the purposes of the act, be deemed the occupier thereof. We are clearly of opinion that this enactment does not apply to any of these premises, although they be all within the general outer enclosure of the dock company, except the custom-house, which is built on land of the company at a considerable distance. Indeed, the point was not seriously pressed by the counsel for the respondents, and there is no necessity for saying more upon it. But they strenuously objected to the deduction of 778*l.* from the sum on which the assessment was to be made, for the expenses of the steamtug; contending that the steamtug was entirely unconnected with, or, at least, collateral to the trade of keeping the docks; that the company carried on two trades, and that the loss upon the trade of steamtug keepers, which was unconnected with the property liable to be assessed, could not be allowed as a deduction from the profits of the docks. But the case finds that the company, being empowered by their act of Parliament to provide out of their income steamtugs for the purpose of towing any vessels into or out of the docks, from or to Southampton or any part of the British Channel, did employ for this purpose the steamtug in question, "which offers considerable advantage to those who use the docks, and may be fairly considered as a useful appendage to the docks, and conducive to the general profits of the concern, although it was not indispensably necessary, inasmuch as the duty might have been done by hiring the steamboats at Southampton for each occasion, but at less advantage and convenience both to the company and the public using the docks." We think that upon this statement the steamtug must be taken to be ancillary to the docks, and part of the floating capital used in carrying on this concern. She was sometimes employed beyond the limits of the docks, but this was only with a view to the traffic carried on in unloading and loading cargoes within the docks. It was admitted, that if ropes fixed to a block in the docks had been run out far beyond the limits of the docks, and being there fastened to ships about to enter, had been used to draw them to the wharf where they were to unload, the expense of those ropes would be a fair deduction from the profits of the concern in estimating the amount of the assessment; and the expense of the steamtug seems to us to rest upon the same principle. The account is credited with the 616*l.* earned by her, and her receipts might have exceeded her expenses, thereby augmenting the sum to be assessed.

We entertained considerable doubt during the argument respecting the 1000*l.*, under the head of direction, stated to be a reasonable

remuneration for the personal trouble and expense, and for the exercise of the skill and judgment of a supposed lessee of the company, in managing the affairs of the docks, independently of the profit on capital employed by him. We were startled by such an allowance for what might be supposed to be done by the lessee personally, in addition to 5*l.* per cent. interest on capital, and 25*l.* per cent. for tenants' and trade profits, although the directors of the company had declined to receive any remuneration for the last year before the assessment. But we have only to consider whether in point of law there ought to be an allowance in a concern of this sort for management, as well as a percentage for interest on capital and tenants' profits. The reasonable amount of these must be deemed matters of fact which the sessions have determined, and the question for us is the same as if the sum put down for management had been 50*l.*, after an allowance of 3*l.* per cent. on capital, and 7*l.* per cent. for tenants' profits. Now, looking to the nature of this concern, and the allowance previously received by the directors, and to which they were still entitled, we cannot say that there ought not to have been an allowance for management, which might be stated as a reasonable remuneration to the lessee of the company in the terms used by the learned recorder. The case of *The Queen v. St. Giles, Camberwell*, was strongly relied upon by the respondents, but there two concerns had been conjoined, one of which only was the subject of the rate, and an allowance was claimed in respect of a payment made to the directors for managing both.

The fourth question arose upon a deduction claimed by the appellants, which was disallowed. They contended that their cranes, steam engines, and other like ponderous machinery, although attached to the freehold, ought to be treated as stock in trade, and part of the capital which a tenant would have to invest in the business, so as to diminish instead of increasing the ratable value of the property of the company. The sessions did find as a fact that these fixtures, worth 6450*l.* to an incoming tenant, although attached to the freehold, are capable of being detached from the freehold as easily, and with as little injury to it, as other fixtures put up for the purpose of the trade of the tenant, and usually valued as between incoming and outgoing tenants. But this is a rate upon buildings to which machinery is attached for the purpose of trade, and it has been solemnly decided, that such real property ought to be assessed according to its existing value as combined with the machinery, without considering whether the machinery be real or personal property, or whether it be liable or not to distress or seizure under a *fi. fa.*, or whether it would go to the heir or executor, or, at the expiration of a lease, to the landlord or tenant. *The King v. The Birmingham and Staffordshire Gas Light Company*. In this last case all the arguments pressed upon us to show that such fixtures are stock in trade, and not to be taken into account in a rate on the realty, were urged, but urged in vain. It is of the greatest importance that a rule upon such a subject, which has been laid down and acted upon, should be adhered to, and we see no reason why this rule should be now disturbed.

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On the last point no reasonable doubt can be entertained, the appellants claiming a deduction of 155*l.* for income tax in respect of the estimated profit of the tenant to whom the docks might be let. This is not a tax upon the subject matter rated, which the tenant as such would be obliged to pay, but upon the net income of the tenant after paying the rent of the premises by which his profits are earned. The cases cited apply to local taxes which affect the subject matter rated, and operate directly in diminution of the rent. For these reasons we are of opinion that the learned recorder of Southampton rightly disposed of all the questions brought before him, and that the order of sessions should be affirmed.

Order of sessions confirmed.

REGINA *v.* COTTLE & others.¹

Hilary Term, January 18, 1851.

Turnpike Act, Construction of—"Town"—Indictment.

A turnpike act, passed in 1840, and which was to be in force for thirty-one years, provided that it should not be lawful to continue or erect any turnpike gate across the roads in the town of T., or in any other town through or into which the said roads might pass or be made:—

Held, that the prohibition extended to the erection of a gate within the limits of the town of T. as it existed at any time during the operation of the act, and not merely at the time when the act passed.

On the trial of an indictment against the turnpike trustees for erecting a gate within the town of T., the judge directed the jury that the word "town" was to be taken in its popular sense of a collection of houses, and that they were to consider whether the spot where the gate stood was so surrounded by houses that the inhabitants might fairly be said to dwell together, the fact of the houses being separated by gardens not preventing them from lying together:—

Held not to be a misdirection.

INDICTMENT for erecting a gate in a highway.

Plea—Not guilty.

The indictment, which was found at the last Spring assizes, for the county of Somerset, was removed by *certiorari*, and came on for trial, before Mr. Russell Gurney, at the Wells Summer assizes, 1850, when it appeared that the obstruction complained of was a turnpike gate erected by the trustees under a local act, 3 Vict. c. 36, (for more effectually repairing several roads leading from the town of Taunton, in the county of Somerset, &c.,) by sect. 27 of which it is provided that "it shall not be lawful for the said trustees to continue or erect any turnpike or toll gate across the said roads in the towns of Taunton and Wellington, or in any other town through or into which the said roads may pass or be made, nor to apply, expend, or appropriate any of the tolls hereby granted, or any of the moneys raised by

¹ 20 Law J. Rep. (n. s.) M. C. 162.

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virtue of the said recited acts hereby repealed, or to be raised by virtue of this act, in repairing or amending any part of the said turnpike roads in any town or place which is or shall be paved or repaired by any commissioners or trustees for executing any local act of Parliament." This act passed on the 19th of May, 1840, and was to continue in force for thirty-one years. The gate in question was erected in 1841, and at the time of the indictment being found there were some houses and gardens on each side of it, but no continuous street existed beyond it.

It was objected for the defendants, that the prohibition in the statute applied only to the erection of a gate within the limits of the town of Taunton as it existed in 1840 when the act passed, and that no evidence had been given to show that at that period the gate would have been within the town. The learned judge reserved leave to the defendants to move to enter a verdict on that ground, and directed the jury to consider whether the gate in question was, at the time of the indictment being found, situated within the town of Taunton, telling them that the word "town" was to be taken in its popular sense of a collection of houses where people congregate, and that they were to consider whether the spot where the gate stood was so surrounded by houses that the inhabitants might fairly be said to dwell together, adding that the fact of the houses being separated by gardens would not prevent them from being said to lie together. The jury returned a verdict for the crown. In the ensuing term a rule *nisi* having been obtained to enter a verdict for the defendants according to the leave reserved, and also for a new trial on the ground of misdirection, and that the verdict was against the evidence, —

Crowder, Butt, and Fitzherbert showed cause.¹ First, assuming that the prohibition applies only to Taunton as it at present exists, there was no misdirection. The learned judge properly defined the word "town" as a place containing a number of houses congregated together, so reasonably near to each other that the inhabitants may be considered as dwelling together. That is the substance of the definition laid down in *Elliott v. The South Devon Railway Company*, 2 Exch. Rep. 725; s. c. 17 Law J. Rep. (N. S.) Exch. 262, to which the learned judge referred in putting this case to the jury. No definition of the word "town" is given in the local act, and, therefore, it must have its popular sense. Then as to the other point. The clause prohibiting the erection of toll gates within the town cannot be confined to the limits of the town as it existed when the act passed. The object of the act was to provide for the repairing of the roads during the thirty-one years for which it was to be in force, and to permit gates to be erected and altered from time to time according as circumstances varied. The object of the prohibition in sect. 27 is to prevent a gate being at any time erected or continued in a place

¹ November 22, before LORD CAMPBELL, C. J., COLERIDGE and ERLE, JJ. WIGHTMAN, J., was sitting in the court for Crown Cases Reserved.

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where it will cut off the access between the inhabitants of different parts of the town. The language of the section, referring to "any other towns through or into which the roads may pass," shows that it clearly contemplated towns not then in existence, arising to which the prohibition was to extend. In *Hammond v. Brewer*, 1 Burr. 376, Lord Mansfield observed, in reference to the construction of a turnpike act, "that it was neither usual nor convenient to erect toll gates in the middle of great towns, which might obstruct the necessary intercourse amongst the inhabitants, or even hinder an inhabitant from sending his horses to water without paying the toll." And in *The Queen v. Fisher*, 8 Car. & P. 612, there is a *dictum* by Patteson, J., that the word "town," in its popular sense, varies from day to day by the erection of new houses.

Kinglake, Serj., Moody, and M. Smith, in support of the rule. First, as to the misdirection, the learned judge should have told the jury that to constitute a "town" there should be a mass of buildings *continuous*, although they need not be absolutely *contiguous*. That is the effect of the decision in *Elliott v. The South Devon Railway Company*. The test of whether the inhabitants might be considered as dwelling together is too general. Secondly, the word "town" in the 3 Vict. c. 36, had a fixed and settled meaning when the act passed, and applied only to the limits of Taunton as they then existed. The words "may pass or be made" in the 27th section must be read there with the 14th, which enables the trustees to discontinue toll-houses in and near the town of Taunton. "Town" must mean the town as it was then, and if so, the same sense ought to be given to the word in the 27th section. The word is used in the same sense in other sections, and the whole act should be taken together. The roads referred to in this act are the same as those referred to in a former local act, 18 Geo. 3, in which the word "town" merely meant the town corporate, and having that former description the word cannot be varied in this 27th section.

[*Lord Campbell, C. J.* We think there was no misdirection. A reasonable construction of what the learned judge said shows that he left to the jury the question of continuity as one of the ingredients upon which the jury were to find their verdict. The other point is one of some difficulty, and we shall take time to consider it.]

Cur. adv. vult.

LORD CAMPBELL, C. J., now said: In this case, having expressed our approbation of the direction of the learned judge to the jury respecting what ought to be considered the limits of a town within the meaning of the act of Parliament on which the indictment is founded, we took time to consider the point upon which leave was reserved to enter a verdict for the defendant, viz., whether the prohibition to continue any turnpike gate across roads in the town of Taunton applies to the town as it was on the 19th of May, 1840, when the act passed, or as it might be at any time during the thirty-one years for which the act was to be in force. We have come to the conclu-

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sion that the latter is the just conclusion. Whatever inconvenience might arise from authorizing the erection of a turnpike gate in a place which when the act passed had been in the country, and before the act expired had become nearly the centre of a great town, if there had been a clear enactment to that effect, we must have been bound by it; but looking to the language here employed, we think that the legislature contemplated the probable increase of Taunton within a period longer than that generally assigned for a generation of the human race, and intended that its inhabitants, as it increased, should be exempt from the annoyance of a turnpike gate cutting off the free intercourse between neighbors in the same street. The words are, "It shall not be lawful for the said trustees to continue or erect any turnpike gate across the said road in the towns of Taunton and Wellington, or in any other town through or into which the said roads may pass or be made." The whole structure of the clause is prospective. What is to be "town" must be the same to the *continuing* as to the *erecting* of a gate, and if a new gate is to be erected in the year 1870, the trustees are surely directed to consider whether the road is then within the limits of the town of Taunton, not whether it was so thirty years before. This construction is fortified by the reference to "any other town through or into which the said roads may pass," — meant, probably, to protect the inhabitants of any new town which might spring up within the district while the act should be in force. We are, therefore, of opinion that the learned judge was bound to leave the question to the jury, whether, when the indictment was found, the gate stood across a road which was to be considered as at that time in the town of Taunton. We have likewise to dispose of the application for a new trial, on the ground that the verdict in the affirmative was contrary to the evidence. Had the verdict been the other way, we should by no means have disapproved of it; but, considering that after the unexceptionable direction of the learned judge, it turned upon a pure question of fact to be decided by twelve gentlemen who had had a view of the locality, and that they may have come to the proper conclusion, we think that their verdict ought not to be disturbed, and that the rule for a new trial must be discharged.

Rule discharged.

DRUMMOND v. TILLINGHURST.¹

Easter Term, April 17, 1851.

Practice — Costs — Non-resident.

A sailor born abroad, having a lodging in this country, will not be required to give security for costs upon an affidavit stating, that after his wages were exhausted he would be obliged to go to sea again, but not showing a domicile abroad.

GREENWOOD moved for a rule *nisi* calling upon the plaintiff to show cause why the proceedings in this action should not be stayed

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until the plaintiff had given security for costs. The plaintiff was a negro, who had been hired by the defendant, the master of a ship, at California, to serve as cook in a voyage to England; in the articles he described himself as a native of Philadelphia, in the United States. On the arrival of the ship at London, on the 15th of March, the plaintiff was paid his wages, and subsequently brought this action of trover against the defendant. The affidavit of the defendant stated that the plaintiff had no residence in this country except a temporary lodging in London, and that after his wages had been exhausted he had no means of subsistence, and would be obliged to go to sea again. There was also an affidavit that application had been made to the attorneys for the plaintiff to give security for costs, which they had refused to do. If it is shown that the plaintiff has only a temporary residence in England, and that there is reasonable ground for believing that he intends to go abroad, the court will require him to give security for costs. In *Naylor v. Joseph*, 10 B. Moo. 522, the general rule was stated to be, that if the plaintiff were not actually domiciled in England, he was bound to give the defendant security for costs; and in *Oliva v. Johnson*, 5 B. & Al. 908; 1 D. & Ry. 560, which is cited in 2 Arch. Prac., by Chitty, 1231, (*note z*.) 8th ed., as the same case as *Naylor v. Joseph*, though that seems very questionable, a rule having been granted for security for costs, the court held that the affidavit of the plaintiff on showing cause was insufficient, because it did not state that he intended to continue to reside in England.

[*Lord Campbell*, C. J. In *Oliva v. Johnson* it was sworn that the plaintiff had a foreign domicil, and there was reason for believing that he was about to return to that residence. Here no domicil elsewhere than in England is shown; and the only ground for the application is, that the plaintiff has no permanent residence in England. The rule is stated in *Evering v. Chiffenden*, 7 Dowl. 536, as I have always understood it, viz., that it is not necessary that it should appear on the plaintiff's affidavit that he is an Englishman.]

The defendant cannot have the means of stating affirmatively where the domicil of the plaintiff, who may be a stranger to the defendant, is. If it were necessary, to support this application, that the plaintiff should have a domicil elsewhere than in England, then the more vagrant a plaintiff is, the less will he be liable to give security for costs.

LORD CAMPBELL, C. J. Mr. Greenwood seeks to lay down a rule, that a person born abroad, having a domicil in England, must give security for costs. But no case goes further than this—that if the defendant shows a domicil of the plaintiff, being a foreigner, out of England, and having no permanent residence in this country, the court will require the plaintiff to give security for costs, unless he shows that he intends to reside in England, the presumption being that a person will go to the place of his domicil. That was the ground of the decision in *Oliva v. Johnson*. To adopt the rule contended for, would be offering a fresh impediment in the way of a plaintiff obtaining justice.

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PATTESON, J. Where the plaintiff is a foreigner, and is domiciled in England, it lies upon the defendant, applying for security for costs, to show affirmatively that his residence here is merely temporary, and that he has a permanent domicile abroad.

WIGHTMAN, J. In all the cases cited, the application has been grounded on the affidavit stating that the usual domicile of the plaintiff was abroad.

ERLE, J. Several cases are cited in 2 Arch. Prac., by Chitty, 1231, 8th ed., in support of this proposition, that "a foreigner in this country, though his permanent residence be abroad, yet if his visit here be more than of a merely temporary nature, will not be compelled to give this security." Anon., 8 Taunt. 737; 3 B. Moo. 78, is to that effect, and that case was acted upon in *Dowling v. Harman*, 6 M. & W. 131. *Oliva v. Johnson*, 5 B. & Al. 908; 1 D. & Ry. 560, is the only case to the contrary; and the decision in it ought not to be extended.

Rule discharged.

LEYLAND v. TANCRED & ARMITAGE.¹

Easter Term, April 20 and 24, 1850, and February 1, 1851.

Distress — Payment into Court — Sale.

In case for distraining for more rent than was due, alleging a sale of the goods, defendants paid money into court:—

Held, that both the distress and the sale were admitted by the plea, and that therefore it was not necessary to show a joint damage beyond the sum paid into court, for that both defendants were liable, although evidence was only given to connect one with the grievance:—

Held, also, that the distress and the sale were substantive grievances, and that the sale was not matter merely of aggravation. [But see *post*, p. 482.]

CASE. The first count stated, that whereas the plaintiff, before and at the time of, &c., held a certain messuage as tenant thereof to the defendant Tancred, at a certain rent therefore payable by the plaintiff to the defendant Tancred; yet the defendants, contriving, &c., to wit, on, &c., wrongfully and injuriously seized and took, in and upon the said messuage, divers goods and chattels of the plaintiff, to wit, &c., as a distress for certain arrears of rent, to wit, 45*l.*, then claimed and pretended by the defendants to be due and in arrear to the defendant Tancred for the said messuage; and the defendants afterwards, to wit, on, &c., under that pretence, wrongfully sold the said goods and chattels as such distress for the said alleged arrears of rent, and the costs and charges of the said distress, and of the appraisement and sale of the said goods and chattels; whereas, in truth and in fact, at the time of the making the said distress, and during all the time aforesaid, a small part only, to wit, 17*l.* 10*s.*, of the said pretended

¹ 14 Jur. 695.

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arrears of rent so distrained for as aforesaid, was in arrear to the defendant Tancred for or in respect of the said messuage. There was a second count in trover. The defendants pleaded to the first count, payment into court of 1s., and no damages ultra; and to the second count, not guilty by statute. The plaintiff replied, damages ultra on the first count, and joined issue on the second. On the trial, before Rolfe, B., at the last Yorkshire assizes, it appeared that a distress was made by the authority of the defendant Armitage for one year's arrears of rent, 45*l.* Armitage conducted the sale, and there was no evidence given to connect Tancred in any way with the distress. The jury gave a verdict for the plaintiff on the first count for 40*l.*, and for the defendants on the second count. In this term,¹ —

Udall moved for a new trial, or in arrest of judgment. First, there was no evidence to connect the defendant Tancred with the distress or the sale.

[*Lord Campbell*, C. J. Can you take this objection after pleading payment into court?]

The payment into court only admits a joint grievance, to the extent of 1s. If damages for a joint grievance beyond that amount are claimed, evidence must be given of the joint act.

[*Erle*, J. Payment into court admits a joint grievance, by distraining for a given sum; the plaintiff may say that the damage was to a greater extent than 1s.]

The payment into court only admits the cause of action. No real damage is sustained by the tenant by reason of a distress for more rent than is due, unless there be a sale. This is not an action under the statute of Marlbridge, for an excessive distress, but (if a cause of action at all) is an action at common law. *Taylor v. Henniker*, 12 Ad. & El. 488; 4 Jur. 719. The sale alleged is not the cause of action; it is an aggravation of the grievance complained of. Payment into court only admits that which the plaintiff would be obliged to prove to sustain the action.

[*Lord Campbell*, C. J. The sale is alleged as a substantive cause of action.]

But such a sale would not be the subject of an action on the case; it would be trespass. In *Thompson v. Wood*, 4 Q. B. 493, 498; 7 Jur. 303, 304, it is said, "Previously to that act," 2 Will. & M. c. 5, "a sale of the goods would have made the defendant a trespasser *ab initio*. No allusion to the sale was therefore made in the count, and clearly no damages could be recovered for it in an action on the case."

[*Erle*, J. In *Taylor v. Henniker* the sale of the goods produced less than the arrears of rent.

Lord Campbell, C. J. The payment admits the illegal act charged in the declaration, and not merely in the abstract, that on some occasion the defendant distrained for more than was due. The declaration alleges a sale. The question is, What is the extent of the damage?

Patteson, J. In *Lloyd v. Walkey*, 9 Car. & P. 771, which was an

¹ April 20, before LORD CAMPBELL, C. J., PATTESON, WIGHTMAN, and ERLE, JJ.

action on the case for so negligently securing a cow of the defendant that it "ran at, butted at, gored, killed, and destroyed" a cow of the plaintiff, it was held that the defendant could not, after paying money into court, go into evidence to show that his cow had not killed the plaintiff's cow.]

Secondly, there was no evidence of a seizure for more rent than was due. It was necessary to show how much more was distrained for than was due, in order to measure the damages. As to arresting the judgment, admitting *Taylor v. Henniker* to be well decided, and that distraining for more rent than is due is a cause of action, (although Parke, B., and Lord Tenterden have said otherwise,) yet, to support the count, words of intent must be used. It must be shown that the act was intentionally or maliciously done. In *Taylor v. Henniker* the count stated that the defendant "*falsely and maliciously*" pretended that the rent was due. Here it is only said that the defendants "wrongfully and injuriously" did the act. That is consistent with its being done ignorantly. [He also contended that the cause of action was trespass, and not case.]

LORD CAMPBELL, C. J. I am of opinion there is no ground for the motion on the first point, viz., that the defendant Tancred took no part in the sale. Looking to the frame of the count, two wrongs are stated in it: first, a distraining; secondly, a selling. Payment of money into court admits both wrongs, and therefore no evidence was necessary to show that the defendant Tancred was accessory to the sale.

As to the motion in arrest of judgment, I am of opinion there was no necessity for stating, directly and expressly, that the wrong was done maliciously. The wrong being done, the party is entitled to a remedy; but there ought to be evidence to show the amount of excess; and we will consult the learned judge whether there was any evidence to go to the jury.

PATTESON, J. The statement in the declaration, that the defendants sold, is not mere matter of aggravation; it is stated as a distinct grievance that the defendants sold, whereas at the time of the distress, and during all the time aforesaid, a small part only of the rent distrained for was in arrear; therefore, after payment of money into court, it does not lie in the mouth of either of the defendants to say that he did not sell.

WIGHTMAN, J. The selling is a clear substantive ground of action, and not mere aggravation. As to the objection that the action should be trespass, and not case, there is no authority for saying that trespass is the proper form of action, and not case. Case may be maintained for a wrongful sale as well as for a wrongful distress; and it may be included in the same count as for wrongful distraining.

ERLE, J., concurred.

Cur. adv. vult.

Tancred & Armitage v. Leyland.

Udall, on the next day, handed up to the court the cases of *Taylor v. Henniker*, 12 Ad. & El. 488, in which Lord Denman, C. J., said, (p. 491,) "The action is at common law, and the selling under the distress is no necessary part of the cause of action; it is aggravation only;" and *Woods v. Durrant*, 16 M. & W. 149, in which Parke, B., said, (p. 155,) "The declaration would be good if the allegation of conversion were struck out. The plea need not have answered that allegation. . . . Then the question is, whether the assuming to answer matter of aggravation which need not have been averred, and answering it imperfectly, . . . makes it bad in substance, and without special demurrer." And in p. 156, "The selling, though an aggravation of the taking, was not necessarily in itself a trespass."

On a subsequent day, (April 24,) —

LORD CAMPBELL, C. J., delivered the further judgment of the court. In this case we think that there is no ground for a rule.

We clearly thought, and after looking at the two cases handed up by Mr. Udall we still think, that payment of money into court by the defendant Tancred was evidence of his being privy to the wrongful sale of the goods, as charged in the first count of the declaration.

As to the point upon which we reserved our opinion, my brother Rolfe reports to us that there was evidence to go to the jury, that not more than half a year's rent was in arrear.

Rule refused.

IN THE EXCHEQUER CHAMBER.

[ERROR FROM THE COURT OF QUEEN'S BENCH.]

TANCRED & ARMITAGE v. LEYLAND.¹

Hilary Vacation, February 1, 1851.

Distress for too large a Sum — Sale, Action for.

Declaration in case alleged as the cause of action, first, that defendant took certain goods as a distress for certain arrears of rent then claimed and pretended by defendant to be due to him, whereas part only of the rent was due; and, secondly, that he wrongfully sold the said goods, as such distress, for the said alleged arrears and costs: —

Held, first, that the allegation as to the sale could not be understood as charging that more goods were sold than were necessary to raise the amount of the arrears actually due, and costs.

Secondly, that the making a distress for rent, some rent being due, accompanied by an untrue claim or pretence that more was due than really was due, is not actionable.

Taylor v. Henniker, 12 Ad. & El. 488; 4 Per & D. 242; 4 Jur. 719, overruled.

JUDGMENT having been given for the plaintiff by the Court of Queen's Bench, (see 14 Jur. 695, *ante*, p. 479, where the pleadings are

¹ 15 Jur. 394.

set out,) the defendant brought a writ of error, and stated the following points: That the first count of the declaration discloses no cause of action, for that no legal injury or damage is shown to have been sustained by the plaintiff below; the only cause of action alleged being, that at the time of the making the distress the defendant below said, or in the language of the declaration pretended, that more rent was due than was in fact due. It will be contended, therefore, that as the declaration admits that a tenancy existed, and that at the time of the seizure and sale of the goods therein mentioned to have been distrained there was some rent due, and that, as it nowhere appears that the said seizure was excessive as a distress, or that the goods so seized were sold for more than the amount admitted to be due, such distress, seizure, and sale were lawful acts. The declaration does not state that the act complained of (if, indeed, any act is complained of) was wilfully or maliciously done. The case was argued in Michaelmas Vacation, (November 27,) before Parke, B., Maule and Cresswell, JJ., Platt, B., and Talfourd, J., by

Peacock, (with him was *Udall*), for the plaintiff in error, (the defendant below.) An action does not lie for pretending that more rent was due than in fact was due, and distraining for it, unless the distress taken was unreasonable, or more than sufficient to satisfy the amount really due. The only case which supports such an action is *Taylor v. Henniker*, 12 Ad. & El. 488; 4 Per. & D. 242; 4 Jur. 719; and the statement in the judgment, that "the distress was unlawful in its inception," is not accurate. In *Wilkinson v. Terry*, 1 Moo. & R. 377, Parke, B., said, (p. 378,) "It was impossible that the tenant could have sustained any damage from the mere circumstance of his landlord having, at the time of the distress, made a claim for more rent than was really due; the substantial question was, whether the landlord had deprived the tenant of more of his goods than the real amount of his debt authorized."

[*Maule*, J. Probably it was not worth while to move for a new trial in that case; 10*l.* damages were given on the second count for not selling for the best price, which was not disputed. There is a strong probability that the plaintiff was a pauper in that case.]

In *Avenell v. Croker*, Moo. & M. 172, Lord Tenterden held, that on the first count, which is stated to have been a count for distraining for more rent than was due, the plaintiff had no cause of complaint; because, though the thing taken was of greater value than was necessary to cover the rent due, there were no other goods of sufficient value on the premises.

[*Maule*, J. Lord Tenterden's language seems to show that the first count alleged that the plaintiff took more goods than he ought to have taken; he must have been of opinion that the cause of action explicitly or implicitly involved those words. If the count ought to be understood as Lord Tenterden seems to have understood it, viz., the taking an unreasonable distress, this count would be right.

Parke, B. A count for an excessive distress is always inserted.]

The earliest precedent for such an action, which is the third count

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in 8 Wentw. Plead. 442, states, that the goods were sold for more than the rent actually due, and that the surplus was detained by the defendant. The tenant sustains no damage by reason of his landlord stating that he distrains for more rent than is due, unless he takes too much.

[*Maule, J.* When the landlord enters to make a distress, it is not necessary that he should make any statement as to the amount of rent due.

Parke, B. And the landlord may say one thing when he distrains, and avow for another.]

Suppose the tenant brought an action for an excessive distress, the landlord could not answer that he pretended that a larger sum was due. Nor is the tenant prejudiced by being prevented from paying or tendering the amount really due; because trespass would lie if a tender of the amount really due was refused.

[*Platt, B.* The action of trespass would refer to the actual taking of the goods.]

It was argued in *Taylor v. Henniker*, 12 Ad. & El. 488; 4 Per. & D. 242; 4 Jur. 719, that if the tenant replevied it would influence the amount of the replevin bond; but the bond is taken in double the amount of the goods distrained, not double the amount of the sum pretended to be due. In *Lynne v. Moody*, 2 Str. 851, it was held that trespass would not lie for taking an excessive distress, and that the remedy was by special action, founded on the statute of Marlbridge, "for at common law the party might take a distress of more value than the rent, so as to make it more eligible for the party to redeem the goods by payment of the rent." There must have been some necessity for passing the statute of Marlbridge, which gives an action for taking an unreasonable distress, and says that the party shall be grievously amerced.

[*Maule, J.* In those times many statutes were passed to enforce the common law, and even to declare recently-passed statutes to be in full force.]

In trespass and replevin the landlord is not bound by a statement which he has made of the amount of rent due; *Crowther v. Ramsbottom*, 7 T. R. 654; neither is he in an action on the case, unless it has altered the situation of his tenant, but the tenant continues to have all the same rights and remedies.

[*Maule, J.* Suppose that on some other occasions the defendant had stated that the plaintiff owed him a larger sum; the plaintiff, in an action of slander, must have proved malice and special damage.]

So, here, he must prove some special damage arising from the misrepresentation as to the amount of arrears.

[*Platt, B.* The count alleges that the defendant sold the goods as a distress for the said alleged arrears of rent.]

But it does not go on to allege that the defendant levied by the sale a larger sum than was due. The declaration in all cases would be good if it omitted the statement that the defendant pretended that more was due; the cause of action is, what the defendant did, not what he said. Suppose the defendant had said that he distrained

for heriot service, and avowed for rent in arrear, would that give a cause of action? In *Crouther v. Ramsbottom*, Lord Kenyon said, (p. 657,) "I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can show that he had a legal justification for what he did, that is sufficient." And Lawrence, J., said, (p. 658,) "It was not material to inquire what the defendants said when they entered and seized, but only whether they had in fact a legal warrant to justify them." [He cited Holt, C. J., in *Dr. Grenville v. The College of Physicians*, 12 Mod. 386, 387, and Lord Kenyon, in *Etherton v. Popplewell*, 1 East, 139.] The count is bad on general demurrer, and therefore the plea of payment does not make it good, nor has the verdict cured it.

Cowling, contra. This count has been recognized as good for many years, and it states enough to show an excessive distress. *Carter v. Carter*, 5 Bing. 406; more fully reported in 2 Moo. & P. 732.

[*Maule*, J. It has been generally joined with other counts.

Parke, B. Such a count is inserted in the earlier editions of Chitty on Pleading, but it contains an allegation that the defendant kept the goods until the plaintiff, in order to regain possession, paid the defendant the pretended arrears of rent. In the last edition, by Greening, (p. 536,) it is framed either for a sale or a detention of the goods.]

Again: the point was not raised in *Taylor v. Henniker*, 12 Ad. & El. 488; 4 Per. & D. 242; 4 Jur. 719. Though the plaintiff might, by a tender, place the defendant in a position to bring trespass, he has sustained damage from the representation as to the amount of the arrear of rent, because it repelled him from making a tender.

[*Maule*, J. In the case of an ordinary debtor, the right amount of money due must be tendered, notwithstanding any statement as to the amount of the debt by the creditor.]

The action upon the *replevin* bond is not for the recovery of the penalty, but for the real amount of rent due, to the extent of the value of the goods distrained. *Hunt v. Round*, 2 Dowl. 558. *Miers v. Lockwood*, 9 Dowl. 975. A statement by the landlord that more is due is calculated to repel persons from coming forward to be sureties. Viewing the case as at common law, the reason given in *Lynne v. Moody*, 2 Str. 851, supports this action. In that case the entry was legal, for the purpose of seizing goods as a distress for the right sum. Claiming more rent than is due is a pressure on the tenant to pay more than is due. In *Rogers v. Birkmire*, Cas. t. Hardw. 245; 2 Str. 1040, a plea justifying under a joint distress for two distinct messages demised in the same deed, at two distinct rents, was held bad. That case is cited in note 2 to *Poole v. Longueville*, 2 Wms. Saund. 284, 6th ed., and recognized in *The Governors of Bristol Poor v. Wait*, 1 Ad. & El. 264, 282, with one qualification, that the action should be case.

[*Parke*, B. A plea must be good altogether: in *Rogers v. Birkmire* it was clearly bad in part.

Maule, J. Perhaps the defendant might have sustained the plea if it had said that he had distrained for rent of the house only, but he

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set up a distress for the rent of the house and the stable; which shows that there is such a thing as an action for distraining for more than is due. There was one good avowry for rent.]

Probably stat. 11 Geo. 2, c. 19, s. 19, caused the form of action to be changed into an action on the case. It must be contended on the other side that there was no remedy at common law, and that a remedy was first given by the statute of Marlbridge, 52 Hen. 3, c. 4. If the landlord splits the distress, assize lies at common law, except in the case of fealty. *Bevill's Case*, 8 Rep. 8 b; *Smith v. Goodwin*, 4 B. & Ad. 413. If trespass would lie at common law, it may be waived. *Branscomb v. Bridges*, 1 B. & Cr. 145. *Holland v. Bird*, 10 Bing. 15. Though a party may excuse himself in trespass or *replevin*, it does not follow that he is not liable in an action on the case. The count is to be construed as if the defendant seized many goods. There were several counts in *Avenell v. Croker*, Moo. & M. 172, but the case turned on the first count, and Lord Tenterden's observation applies to it.

[*Parke, B.* We do not know exactly what the form of the count was in that case. In *Crowder v. Self*, 2 Moo. & R. 190, though it is stated to have been case for an excessive distress, I cannot help suspecting that the count was for distraining for too much.]

Then Lord Abinger's words in that case confirm Lord Tenterden's observations in *Avenell v. Croker*. This count alleges a sale as well as a seizure.

Peacock, in reply. The landlord is not liable, unless he sells unreasonably for more than was due; it is not enough to charge respecting the sale, that he "thereby produced more than was due."

[*Maule, J.* The landlord cannot hit off to a farthing what the rent and the expenses would amount to, and, *non constat*, that the thing distrained and sold for the purpose of raising the required amount was an undivided chattel.]

The count ought to go on and say that the defendant did not return the surplus. As to the supposed damage: first, in making a tender, the tenant must act upon his own knowledge of what is due. "If the landlord distrains for rents or services, he need not give notice to the tenant for what thing it is he distrains it; for the tenant, by intendment of the law, knows what is in arrear from his land." 9 Vin. Ab., "Distress," 178, S., pl. 1; referring to 45 Edw. 3, 9.

[*Parke, B.* Notice of the distress is only necessary, under stat. 2 Will. & M. c. 5, s. 2, to justify a sale.]

Secondly, supposing that inability to get sureties would be the ground of special damage; it is admitted that 10*l.* was in arrear, and, therefore, if the plaintiff had given a *replevin* bond, he would have been defeated. Lastly, the count is not cured by the pleading or verdict. *Tubbutt v. Selby*, 6 Ad. & El. 786.

[*Parke, B.* If any passage in the count is capable of being construed as charging that the defendant sold for more than was due, admitting that to be actionable, would it not be so understood after the defendant had paid money into court?

Cresswell, J. If the defendant sold for more than was due, it may be that he went on wilfully after having raised sufficient.]

Cur. adv. vult.

PARKE, B., now delivered the judgment of the court. After stating the pleadings and the entry of the judgment on the first count, his lordship proceeded: On the argument before us, it was contended that the first count of the declaration was bad, inasmuch as it disclosed no cause of action, as no legal injury was shown to have been sustained by the plaintiff below.

The first count alleges as the cause of action, first, that the defendant took certain goods as a distress for certain arrears of rent then claimed and pretended by the defendant to be due to him, whereas part only of the rent was due; and, secondly, that he wrongfully sold the said goods as such distress for the said alleged arrears and costs. As some rent is admitted to have been due at the time of the distress, the distress itself was not a wrong to the plaintiff below. There is no allegation that unreasonable quantity of goods were taken, so as to constitute an excessive distress; and the only questions are, whether the fact of making a distress for rent, some rent being due, is rendered illegal by being accompanied by a claim or pretence by the defendant that more was due than really was due, or by being followed by a sale of the goods distrained for those pretended arrears, in the manner described in the latter part of the first count.

It cannot be disputed that the untrue claim or pretence may give a cause of action, as all untrue statements may, if all the circumstances should occur with respect to it which are necessary to make a false representation actionable; and, amongst others, if it had been followed by any special damage, and if, for instance, the tenant had been prevented thereby from obtaining sureties to join in the *replevin* bond, some friends being ready to join in a bond to secure the true amount, who would not join in one to secure the amount claimed. Nor can it be disputed, that if a larger quantity of the goods so taken than was sufficient to raise the amount of the rent in arrear, and legal costs, had been subsequently sold, such excessive sale would have been illegal and actionable. But it was contended for the plaintiff in error, that, putting the construction the most favorable to the plaintiff below on the allegation in the first count as to the sale, it had no such import.

We agree that every intendment is to be made for the plaintiff, and that the declaration is to be construed to a certain sufficient cause of action, after pleading over, if it be reasonably capable of such a construction; but we think this allegation cannot be reasonably so understood. The averment is, simply, that the goods distrained were sold for the said arrears and costs; that is, for the purpose of satisfying the said alleged arrears and costs, not a sum *equal* to the said arrears and costs, or so as to raise the said arrears. There is no express or implied averment that *more goods* were sold than were necessary to raise the amount of the arrears actually due and costs; and all that need have been proved, if the allegation had been traversed, was, that

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he sold the goods seized for the purpose of paying the arrears and costs; and consequently, by the plea, nothing more is admitted.

That being so, the only remaining question is, whether the simple fact of making a distress, accompanied by an untrue claim or pretence that more was due than really was due, is actionable. It is said that it was so at common law, and the argument is, therefore, founded on the supposition that the *common law* casts a duty on a landlord distraining, to inform the tenant what is the arrear of rent for which he distrains. We think that the common law casts no such obligation on the distrainer. It has been expressly laid down, that if the lord distrain for rents or services, he has no occasion to give notice to the tenant for what thing he distrains, for the tenant, by intendment, knows what things are in arrear for his lands; 1 Roll. Ab. 674, "Distress," S., pl. 1; and the authority for this is the Year Book, 45 Edw. 3, 9, where Chief Justice Fincheden, in answer to the argument that the lord on the taking of a distress ought to give notice to the tenant of the cause of the taking, says it is not so, for the tenant is always held, by common intendment, to know what things are in arrear from his land, as rent and service, &c. This is adopted by Lord Chief Baron Gilbert. Gilbert on Distress, 48.¹

The defendant, however, relies upon the decision of a similar question by the Court of Queen's Bench in the case of *Taylor v. Henniker*, 12 Ad. & El. 488; 4 Per. & D. 242; 4 Jur. 719, in which it was laid down, that a distress under pretence that more was due than really was due, was unlawful in its inception, the sale being mere matter of aggravation. We do not think that case was well decided. On the argument no authority was cited in favor of the decision, and those above referred to in Roll. Ab. and the Year Book were not brought before the court. Some *nisi prius* authorities which were cited were in favor of the defendant, that of Lord Tenterden, in the case of *Avenell v. Croker*, Moo. & M. 172, in particular; and that of Lord Abinger, in *Crowder v. Self*, 2 Moo. & R. 190, was not cited. We are not satisfied with that decision of the Queen's Bench, and think it should be overruled.

The judgment, therefore, in the present case, must be reversed.

Judgment reversed.

¹ The passage referred to is in the original edition, but not in the 4th ed., by Impey.

Ashly v. Brown.

ASHLY v. BROWN.¹

Bail Court, Trinity Term, June 3, 1850.

Setting aside Proceedings — Notice of Trial where Defendant's Attorney dead — Notice of Taxation of Costs left at Attorney's Office after his Decease.

A notice of trial was, on the 10th of August, 1849, given to the defendant's attorney for the first sittings in Michaelmas term. On the 9th of October, the defendant's attorney died. In pursuance of such notice the cause was duly entered, and tried on the 3d of November, when a verdict was found for the plaintiff. On the 8th of November, notice of taxation of costs was given on behalf of the plaintiff, by leaving the same at the deceased attorney's office, the plaintiff being unaware of his death. On the 9th of November, the plaintiff signed judgment for the debt and cost; and in March, 1850, the defendant then being in custody, a detainer was lodged against him. A rule having been obtained to set aside all the proceedings subsequent to the 9th of October, the defendant swearing that he had no notice of any proceedings subsequent to the plea until the detainer was lodged, but omitting to state the time he first received intimation of the attorney's death, the court discharged the rule.

THIS was a rule calling upon the plaintiff to show cause why all proceedings taken in this cause since the 9th of October, 1849, should not be set aside, and why the defendant should not be discharged out of the custody of the sheriffs of London, as to this action, and why the plaintiff should not pay the costs of and occasioned by this application. The following were the facts of the case, as they appeared upon the affidavit of the defendant: The deponent stated, that in May, 1849, the present action was commenced, when the deponent retained an attorney of the name of Walters to defend him; that Walters informed the deponent that a declaration had been delivered, in which the venue was laid in Surrey; that, on an affidavit being made of the cause of action having arisen in Middlesex, an order was thereupon made to change the venue to the latter county; that a plea was delivered in the cause, after which the deponent never heard of any more proceedings being taken in the cause on the plaintiff's part; that the deponent was informed and believed that Walters died on the 9th of October following, up to which period, as the deponent was informed, no issue or notice of trial had been delivered to Walters in the cause; that the deponent had not authorized any other attorney to act on his behalf; and that no notice of any proceedings having been taken ever came to the deponent's knowledge until the 20th of March, 1850, when a detainer was lodged with the sheriffs of London against the deponent, at the suit of the above plaintiff. The deponent further stated, that he had a good defence to the action upon the merits, and that he had instructed his now attorney to defend the same, should the court grant the present application by setting aside the proceedings. By another affidavit it appeared that the plaintiff had signed judgment on the 9th of November, 1849, for 45*l.* debt, and 28*l.* 5*s.* costs.

In answer to these affidavits on the part of the deponent, the plaintiff's attorney, in his affidavit in reply, stated, that on the 7th of July,

¹ 15 Jur. 390.

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1849, the declaration was delivered; that on the 20th of July following, Walters delivered a plea on behalf of the defendant, as his attorney, and that on the 10th of August, 1849, issue and notice of trial was given for the first sittings in Michaelmas term then next; that on the 3d of November following, the cause was tried, in pursuance of such notice, when a verdict was found for the plaintiff; that notice of the taxation of the defendant's costs was given on the 8th of November, which was served at the office of Walters; that the costs were taxed, and a *fi. fa.* issued thereupon on the 14th of November; that, under the warrant granted thereupon, the officers of the sheriff called several times at the residence of the defendant, and searched for goods whereon to levy, but none were found; that at that period the defendant was not in custody, and that it was the deponent's belief that the defendant must have known that a *fi. fa.* was out against his goods; that in December, 1849, the sheriff, under the *fi. fa.*, seized the leasehold house of the plaintiff, which, on the 1st of January, 1850, was sold in part satisfaction of the defendant's claim; that on the 20th of March following, a *capias ad satisfaciendum* was issued for the residue, and lodged at the secondaries' office, the defendant at that time being in the custody of the sheriffs of London. The deponent further stated, that he had not been informed of the death of Walters, the defendant's late attorney, and until the 25th of March, 1850, when the defendant made an application to a judge at chambers to set aside the judgment, which was refused.

Ogle now (June 3) showed cause. It is submitted that the present rule must be discharged. There is no irregularity on the part of the plaintiff; all his proceedings are correct. The notice of trial having been delivered to Walters on the 10th of August, two months before his death, there can be no pretence for the present application; besides which, the defendant does not venture to swear that he was not informed of the death of his attorney long before the trial. On the part of the plaintiff, it is distinctly sworn that his attorney was not acquainted with the fact until the application to set aside the judgment was made. There is another objection, however, which is fatal to the applicant; three terms have elapsed since the trial; had the defendant, therefore, been entitled to make this rule absolute, the application is now too late.

Joyce, in support of the rule. The affidavit of the defendant states that he was not aware that any notice of trial had been given, or any proceedings taken after plea. The rule of practice is, that on the death of the attorney, the party of the attorney so dying must appoint another, or else be treated as though he were acting in person; at all events, the death of the attorney ought to have been suggested on the roll; the plaintiff omitted to do this; he was, therefore, irregular in serving notice of the taxation, after the death of Walters, at his office. Even after the verdict the defendant may have grounds for moving the court for a new trial. If no notice of taxation is

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given, how is it possible that the defendant should have an opportunity of knowing that a verdict has been obtained against him in the absence of such notice?

WIGHTMAN, J. From the affidavits it is perfectly consistent that the defendant was fully aware of the death of his attorney immediately after that event occurred. This, I think, may be fairly assumed. How can it be said then, when the defendant had knowledge of the death of his attorney, but the plaintiff had not, as is distinctly sworn, that the plaintiff is bound to notice it by serving the proceedings on the defendant in person? Notice of trial having been so given before the death of Walters, all that remained to be done was the giving notice of taxation. Had there been no notice of trial given before the death of Walters, the case might have been different. It was upon this ground the rule was granted. This has been completely answered by the affidavits filed in opposition. The rule, therefore, must be discharged, with costs.

Rule discharged with costs.

HUNT v. THE GREAT NORTHERN RAILWAY COMPANY.¹

Easter Term, April 17, 1851.

County Court — Prohibition — Title to Tolls.

A question whether certain tolls, claimed under an act of Parliament, should be paid in advance or not, does not involve the title to tolls, so as to oust the jurisdiction of a judge of a county court, under the stat. 9 & 10 Vict. c. 95, s. 58.

WORDSWORTH moved for a rule calling on the judge of the County Court at Barnet, in Hertfordshire, to show cause why a writ of prohibition should not issue restraining him from proceeding further in this cause. The point arose under the 58th section of the stat. 9 & 10 Vict. c. 95, whereby jurisdiction is given to county courts, with, however, certain exceptions, and among the excepted cases are those in which "the title to any toll shall be in question." The Great Northern Railway Company carry on a large trade in coals, and are required by their act, 13 & 14 Vict. c. 61, to convey coals for other persons in carriages belonging to such persons at the rate of three farthings per ton per mile, and also to convey back the empty carriages at the rate of 4½d. per mile for each carriage. The plaintiff, Hunt, was desirous of sending ten trucks of coal from Peterborough, to Potter's Bar, but the company refused to convey them unless he paid their charges in advance, including those in respect of the return empty trucks. The plaintiff insisted that they were not entitled to these last-mentioned charges, and thereupon sued the company in the County Court for the damage which he had sustained by reason

¹ 15 Jur. 400.

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of their refusal. Upon the hearing of the plaint, on the 24th of February last, it was objected on behalf of the company, that the judge had no jurisdiction to try the case, inasmuch as it involved a *bona fide* question of title to these tolls for the return carriages. Judgment, however, was given for the plaintiff to the extent of 53*l.* 10*s.* 10*d.*

[Coleridge, J. This is not a dispute as to the title to tolls, but it is said that they were wrongfully claimed in advance.]

It was argued on the other side that we were not entitled to make any charge for return carriages.

COLBRIDGE, J. The right to make a charge is different from a title to toll. This is a mere question upon the construction of an act of Parliament, and that surely is within the jurisdiction of a county court judge. It seems to me that the title to toll did not come into question, but only the right to receive payment in a particular instance under the company's act. It was not contended that the company had no right to toll on certain carriages; but the question was, whether these were carriages within the meaning of the section in the act, and, as such, liable to toll at that time. The judge had a perfect right to decide this.

*Rule refused.*¹

HARLOW v. WINSTANLEY.²

Bail Court, Trinity Term, May 29, 1850.

Arbitration — Order of Reference by Inferior Court, when made a Rule of Superior Court, under the 9 & 10 Will. 3, c. 15.

Where an order of reference of an inferior court of record, made by consent of the parties, contained a clause that the order might, at the option of either party, be made a rule of her majesty's Court of Queen's Bench, under the stat. 9 & 10 Will. 3, c. 15, it was held, that, as an agreement of reference between the parties, it might be made a rule of court.

THIS was an application to make an order of reference of the Borough Court of Derby a rule of this court, under the 9 & 10 Will. 3, c. 15, s. 1. The order of reference was in the following form:—

"In the Court of Record of the borough of Derby. *David Harlow v. Israel Winstanley.* Upon hearing the attorneys on both sides, and by their consent, it is ordered, that all matters in difference in this cause be referred to the award, order, arbitrament, final end, and determination of Robert Grace, of the borough of Derby, surveyor, so that he shall make and publish his award in writing, of and concerning the matters referred, ready to be delivered to the parties, or such of them as shall require the same, on or before the 1st day of

¹ A similar motion was made in the Court of Common Pleas a few days afterwards, and with a like result.

² 15 Jur. 426.

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December, now next ensuing, or on or before such further or ulterior day to which he may, by indorsement hereon, enlarge the time for making the award." [The order contained the other usual clauses in an order of reference; after which a clause as follows:] "And it is further ordered that this order may, at the option of either party, be made a rule of her majesty's Court of Queen's Bench. Dated this 8th day of October, in the year of our Lord, 1849.

"By the court,

(Signed) "B. T. BALGUY,

"Registrar."

Upon this order was a seal, purporting to be the seal of the Borough Court of Derby. The affidavits made in support of the application stated, that the arbitrator had, in pursuance of the power reserved to him, enlarged the time for making his award, by indorsement on the order of reference, which indorsement was properly verified. In the affidavit made by the attorney on behalf of the plaintiff, he deposed that the order of reference was made by and with the consent of himself and the attorney for the defendant; that the order was duly made, as it purported to be, by and under the seal of the Borough Court of Derby; and that the same was binding and effectual on the parties to the suit.

Paterson now appeared in support of the application. It is submitted that the order of reference, containing, as it does, an agreement that the same may be made a rule of this court, is binding upon the parties as if made in a cause in one of the superior courts. There is nothing in the stat. 9 & 10 Will. 3, c. 15, to preclude the order of an inferior court, directing a reference, containing such consent, from being made a rule of court.

WIGHTMAN, J. There is certainly a difficulty in making an order of an inferior court a rule of this court. I do not know, however, why the order may not be considered as an agreement of submission between the parties, containing a clause to that effect. Treating it as such, I think you may take your rule.

Rule granted accordingly.

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Easter Term, April 30, 1851.

Outlawry — Arrest — Discharge — Practice.

The plaintiff in an action, having obtained judgment, proceeded to outlawry against the defendant, who was arrested upon a *capias ulagatum*. The plaintiff then died, leaving two infant children, but no personal representative. An application for the discharge of the defendant, upon the ground of the plaintiff's death, was opposed by the late plaintiff's

¹ 15 Jur. 427.

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attorney, who had advanced money in the action upon the security of the judgment, and who intended to take out administration to the plaintiff: —

Held, that the defendant was not entitled to be discharged.

[*Wagstaffe v. Darby*, Barnes, 366, disapproved. — Ed.]

THIS was a rule calling upon the plaintiff (on notice to be given to his attorney) to show cause why the defendant should not be discharged out of custody of the sheriffs of London as to this action. An action had been brought and referred to arbitration, and judgment signed on the 3d of August, 1847, for 420*l.*, the amount found to be due to the plaintiff by the award. The defendant being abroad, proceedings to outlawry were taken, and judgment in outlawry signed on the 1st June, 1848; thereupon a writ of *capias utlagatum* issued. The defendant afterwards came to England, was arrested by another party, and detained upon the *capias utlagatum* on the 25th of March, of the present year. During the progress of the cause, the attorney for the plaintiff had advanced various sums of money, which he was authorized by the plaintiff to retain out of the proceeds of the action. The plaintiff died in February, 1849, after the judgment in outlawry had been obtained, and he left two infant children under ten years of age. There was no personal representative of the plaintiff.

Lush showed cause on behalf of the attorney for the late plaintiff. It was stated in his affidavits, that the attorney intended to administer to the effects of the plaintiff, so as to realize assets, and in particular to enforce payment upon this judgment; and he believed, that unless he were permitted to do so, the money would be lost. In this case, a person in prison on a judgment of outlawry — a judgment in which the crown was interested as well as the plaintiff — was seeking to be discharged because the plaintiff was dead, and that against one who had a lien on the judgment, and who, in the absence of the next of kin, was entitled to take out letters of administration. The application, under such circumstances, was unprecedented. There were cases in which the court had discharged the defendant when it appeared that the plaintiff was dead, and his next of kin had declined to take out administration. *Camp v. Pote*, 8 C. B. 375.

[*Coleridge, J.* The attorney there stood upon his lien.]

Yes; but that was his general lien, and he did not state that he was about to take out administration; the only question there was, whether the attorney had any right to oppose simply on the ground of lien. In *Taylor v. Burgess*, 16 L. J., Ex., 204; 4 Dowl. & L. 708, the court refused the application; and Parke, B., said, "I think there is no ground for the interference of the court, although there may be no person who can give a legal discharge." There the plaintiff had been dead eleven years; there were no personal representatives, and no intention of taking out administration. The cases cited there were very distinguishable. In *Gore v. Wright*, 1 Dowl. N. S., 864, the application was made in 1842, the plaintiff having died in 1841, and there was no intention on the part of the next of kin to take out administration. *Parkinson v. Horlock*, 2 N. R. 240, was similar in its facts. In *Broughton v. Martin*, 1 B. & P. 176, the court directed the rule to be served on the attorney of the plaintiff's family.

[*Coleridge, J.* Has the practice been to serve the rule on the next of kin?]

It was so served in the above cases. There was no case in which the court had discharged the defendant where a party had said he was interested, and meant to take out administration. It was in all cases a stretch of authority to discharge a man from regular and legal custody without payment of the debt for which he had been arrested. Again: the children had a right to the judgment debt of the father. No one had been brought to represent them, and how could the court decide upon their rights in their absence? They had not renounced, and on the ground of their interest alone the rule should be discharged. The next point was, that the attorney, by virtue of his lien, had a right to detain the defendant in custody. He was in a different position from the attorney in *Camp v. Pote*; there nothing beyond the relation of attorney and client existed; but here money had been advanced on the security of this judgment, and he must be taken to be in the same position as if the judgment had been assigned to him, and the interest of a judgment creditor *pro tanto* vested in him. There was a distinction between this and an ordinary judgment. This was a judgment in outlawry in a civil action, and must be regarded, as far as the interests of the crown were concerned, as if it were a judgment at the suit of the crown. *Rex v. Cooke, M'Cl. & Y.* 196. The rule could not be made absolute without notice to the crown. Suppose property taken, it could not be disposed of without the consent of the crown, particularly where there were infants, the crown being their guardian for this purpose. If the defendant had come to reverse the outlawry, instead of applying to be discharged, he must have paid the debt and costs. As this was not an application to set aside the judgment or the *capias utlagatum*, it could not be objected that the writ issued after the death of the plaintiff.

O'Malley and Ball, in support of the rule. This was not a novel application; there had been a regular series of decisions upon it down from the time of *Barnes* to the present day. It was said, however, that previous cases differed from this, because in them the applications were backed by the affidavits of the next of kin that they did not intend to take out administration; but in only one case was this course adopted in the first instance; in some the next of kin came in afterwards, and said they did not object. The attorney in the action cannot be admitted to show cause in his own behalf. *Pyne v. Erle*, 8 T. R. 407; *Shoman v. Allen*, 1 Man. & G. 96, note (c.) In *Camp v. Pote*, a rule was obtained "calling on the personal representatives (if any) of the plaintiff, upon notice of the rule to be given to them, or to the attorney in the cause of the late plaintiff," to show cause; and the difference between that rule and this is, that we name the plaintiff as the party to show cause. It is obvious from the whole subject matter, that though he is named, the personal representatives are intended; and notice of the rule was properly given here, as in that case, to the attorney of the plaintiff, as being the most likely person to know who are the personal representatives of his client. We do not

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know who they are: the children are not so, for they are under the age of ten years. In *Camp v. Pote*, also, the court were of opinion that the interest the attorney had in the judgment did not entitle him to oppose the discharge of the defendant.

[*Coleridge, J.* Nothing was said in that case as to there being other relations; but here you have two infants clearly interested, and there may be administration *durante minoritate*.]

We have only to deal with the personal representatives, and not with the next of kin. Again: it is urged that in this case the money was advanced upon the security of the judgment; but the first lien upon a judgment is that for costs, which takes precedence of all others; and if that, which is of the highest and most abiding character, be not sufficient to justify an attorney in opposing the discharge of a defendant where the plaintiff is dead, surely the less cannot.

[*Coleridge, J.* Unless they stand on different grounds. The lien, which proceeds from the mere relation of attorney and client, may be determined by death, but not so if it is a matter of personal contract; one may survive, the other not.]

There can be no valid assignment of a judgment to the attorney. Suppose the deceased had become an insolvent, would the assignees have been compelled to discharge this lien for money advanced before they took the benefit of the judgment? This was not a case of lien, properly speaking, for the attorney had nothing to retain until he was repaid. It was said, that as this was a judgment in outlawry, it was distinguishable from the other cases, but that is not so. *Wagstaffe v. Darby*, Barnes, 366; *Adcock v. Fiske*, 9 L. J., C. P., 17. Here was no person capable of giving a discharge for the debt and costs, and therefore it could not be said that the defendant was in the same position as if he came to reverse the outlawry. It was not stated in the affidavits of the attorney that he would take out administration, but only that it is his present intention to do so: that was not sufficient.

[They also cited *Walker v. Thellusson*, 1 Dowl. N. S., 277; and referred to *Ridsdale v. Latour*, moved in the Common Pleas this term, which the court had referred to the master to report upon.]

COLERIDGE, J. Several points have been discussed, on which, if it had been necessary to give an opinion, I should have wished to see the affidavits, and to consider the authorities which have been cited; but from my view of the case, and from its having been before me at chambers, it is not necessary that I should reserve my judgment. Apart from all considerations arising out of the proceedings in outlawry, it appears that the plaintiff died in 1849, having recovered a judgment against the defendant, who is in custody. It is clear that an ordinary application for the discharge of a defendant, merely on the ground of the plaintiff's death, is sufficiently answered if it be shown that a person is about to become his administrator. If this case can be brought within that principle, it should receive the same decision. Though now in 1851, yet the question may be considered as if it had arisen immediately after the death of the plaintiff, for it does not appear that such death was known to either party until

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lately. The plaintiff has left two children; their interests ought to be protected, and the Ecclesiastical Court can protect them by granting administration *durante minoritate*. Besides that, there is the lien of the attorney, who has advanced money, and ought to be repaid. I do not pronounce upon the exact legal result of such lien, but I ought not to conclude him from availing himself of the benefit of it, and one part of that benefit is the hold he has on the defendant whilst in custody. He expresses his intention to take out administration, and if I at once discharged the defendant, I should deprive the administrator, whoever he may be, of the chance of getting the fruits of this valuable judgment. So it would stand, independently of the case in Barnes's notes; but that is far too loose to be acted upon, as opposed to the weight of decisions and sound principle.

Rule discharged.

[APPEAL FROM COUNTY COURT.]

WATSON v. THE AMBERGATE, NOTTINGHAM, AND BOSTON RAILWAY COMPANY.¹

Easter Vacation, May 14, 1851.

Liability of Railway Company, as Carriers, for Loss occurring beyond their own Line — Measure of Damages — Raising Objections on Appeal from County Court that were not taken on the Trial — Effect of Case stated for Opinion of the Court of Appeal.

Where a railway company receive goods at one terminus to carry them to another, they are answerable for any loss that may occur between them, although it may be on a line of railway that does not belong to such company; and the receipt of goods so to be carried is *prima facie* evidence of such liability; confirming *Muschamp v. The Lancaster and Preston Junction Railway Company*, 8 M. & W. 421.

Upon an appeal from a county court, under the 13 & 14 Vict. c. 61, s. 14, the parties are bound by the case as it is stated for the opinion of the court, and cannot travel out of it.

On such appeal, only such objections can be raised as were taken at the trial in the county court.

A prize had been offered for the best plan and model of a machine for loading colliers from barges, and plans and models intended for the competition were to be sent by a certain day; the plaintiff sent a plan and model accordingly by a railway, but through negligence it did not arrive at its destination until after the appointed day:—

Semble, by *Erie, J.*, the proper measure of damages in such a case is the value of the labor and materials expended in making the plan and model, and not the chance of obtaining the prize, as the latter is too remote a ground for damages.

In this case a plaint had been entered in the Grantham County Court against the Ambergate, Nottingham, and Boston Railway Company, for the recovery of damages sustained by the plaintiff by reason of the non-delivery in proper time of plans and models sent by him from Grantham to Cardiff. The plans and models were sent to Cardiff

¹ 15 Jur. 448.

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for the purpose of competing for a prize of 100 guineas, offered by the Glamorganshire Canal Company, for the best plan and model of a vessel or machine to load colliers from coal barges, but as they arrived too late for the competition, the plaintiff had lost his chance of success, and now brought his action for compensation, laying his damages at 50*l*. The railway of the company extended only as far as Nottingham, where it was joined by another railway, which was continued to Bristol. It appeared that a person of the name of Chevins had been appointed by the station master of the company at Grant-ham, to receive and deliver parcels to be sent by the railway from that place, and that in such capacity he had received the package in question, which was directed to Cardiff; and there was some evidence to show that Chevins had told the plaintiff that the package would arrive at Cardiff in time. The station master had said, when the package was delivered to him, that he could receive payment for it only as far as Nottingham, as he had no rates of payment beyond, and thereupon the words on the package "paid to Bristol" were erased, and the words "paid to Nottingham" substituted by Chevins, but this was done without the knowledge of the plaintiff, and the original direction was left on the package, which, being detained at Bristol, did not arrive at Cardiff till the day after the award of the prize. At the trial, before the judge of the County Court, these facts were proved, and the plaintiff sought to recover the value of his labor and the materials employed in the construction of the plans and models, but the judge was of opinion that the true measure of damages was the loss of the chance of the prize of the 100 guineas. The plaintiff then called his brother and another witness, who stated that they had seen the different plans and models which had competed for the prize, and they considered that the plaintiff's plans and models were better than any of them. Objection was then made, on the part of the defendants, that the adjudicators of the prize ought to have been called. This objection was overruled by the judge, who awarded to the plaintiff the sum of 20*l*. The company now appealed against this decision, on two grounds: first, that they were not liable for the carriage beyond Nottingham, and it was admitted that the default occurred afterwards; and, secondly, that the judge ought to have awarded only nominal damages, as there was no evidence in respect of them.

Denison, for the appellants. Chevins was the agent of the plaintiff, and not of the company; any arrangement, therefore, between him and the plaintiff did not bind the company, and the alteration made by Chevins in the words on the package was, in fact, an alteration by the plaintiff, admitting that the carriage could be paid only as far as Nottingham. But if Chevins was not the agent of the plaintiff, he was a mere booking porter, and therefore could not make contracts for the company. *Gilbart v. Dale*, 1 Nev. & P. 22; 5 Ad. & El. 543. It was there decided, that the contract entered into by a booking-office keeper, who takes in parcels to be forwarded by carriers, is only to deliver safely to a carrier. The defendants, then, were

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not liable, unless it could be maintained, that, having received the package at Grantham, their liability in respect of it continued during the whole route to Cardiff. The other side would rely on the case of *Muschamp v. The Lancaster and Preston Junction Railway Company*, 8 M. & W. 421. There, a parcel was delivered at Lancaster to the Lancaster and Preston Junction Railway Company, directed to a person at a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the bookkeeper said it had better be paid by the person to whom it was directed, on the receipt of it. The Lancaster and Preston Railway Company were known to be proprietors of the line only as far as Preston, where the railway united with the North Union line, and that afterwards with another, and so on into Derbyshire. The parcel having been lost after it was forwarded from Preston, the court held the Lancaster and Preston Railway Company liable for its loss. That case so far agrees with this, that the company carried only over a certain portion of the distance to be traversed. But there the company's agent said to the person who brought the parcel, that it would be better to pay for it in Derbyshire, far beyond their own line, and this was considered *prima facie* evidence that they had entered into some kind of an arrangement with the other companies for the transmission of parcels. In this case, however, as soon as the package is brought to the station, the company's agent immediately limits their liability by saying that the carriage can be paid only to Nottingham. As respects the damages, the case is peculiar. The committee who offered the prize had a discretion in the matter, and were not bound to award any prize at all. There was no evidence as to the number of models sent in, or who were the adjudicators. The judge found the money value of the plaintiff's chance of a prize was 20*l.*, but the damage is altogether too remote. *Parkins v. Howard*, K. B., T. T., 1817, seems to be reported only in 1 Chitty on Pleading, 348, 7th ed., where it is given as an authority for the position, that "damages must be proximate, and not remote, or depending upon a contingency; and therefore, in an action for not replacing stock, it will be of no avail to state in the declaration that the plaintiff was prevented from completing an advantageous contract he had entered into." As, if A contracted to lend stock to B if B re-transferred it within a particular time, and B not doing so, A is deprived of some speculative advantage, he sues B, and estimates damages at the increased gain which he might have made. This is not the proper measure. [He also cited *Worthington v. Warrington*, 8 C. B. 134, and *Walker v. Moore*, 10 B. & Cr. 416.]

Lush, for the respondent. Chevins was the agent of the company, and being instructed to receive and *deliver* goods at the station, he was something more than a mere booking porter. The only alteration on the package was as to the payment of the carriage, and that was expressly done merely because the rate of fares beyond Nottingham was not known. They therefore received it for the purpose of its being carried to Cardiff, and, as they did not say that they would not be liable beyond Nottingham, they became bound to carry it to

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its destination, It is precisely the case of *Muschamp v. The Lancaster and Preston Junction Railway Company*. There the carriage was not paid by the party sending it, and that was relied upon as a ground for exempting the company from liability. It was clear, however, that they were afterwards to receive payment for the whole journey. As to the damages, the only question is, whether the evidence was receivable or not. This court has nothing to do with the amount of damages, and has no power to reduce them.

[*Erle, J.* In this action against a carrier for not delivering in due time, was evidence admissible to show that the plaintiff might have gained the prize? Suppose that you have contracted to purchase corn, which is delivered one day too late, whereby you have been deprived of the benefit of a sub-contract, and by reason thereof you are made a bankrupt, can this be estimated as damage in an action for the non-delivery of the corn according to the contract, or must not the damages be proximate?]

The objection was, that the best evidence was not called. It was not contended that this was not the proper measure of damages, after the judge had intimated his opinion to that effect. The more important point, as to the measure and remoteness of damages, does not now arise, and in any event this objection to the evidence would be only a ground for a new trial. There is no analogous case; the authorities cited were instances where the damage was one degree more remote than in the present case. The loss on a sub-contract would be quite independent of the contract sued upon; but here the plaintiff made the plans and models for a given purpose, which was directly defeated by the wrongful act of the company.

Denison, in reply. The court, under the stat. 13 & 14 Vict. c. 61, s. 14, may make any order it may think fit. The words are, "And the said court of appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order, with respect to the costs of the said appeal, as such court may think proper; and such orders shall be final." The distinction suggested between this case and others that have been cited respecting damages does not affect the principle which is contained in them, and that is, that damages which do not clearly result from the wrongful act are not to be awarded. The contingency which intervened in this case prevents the consequences, in respect of which the damages were assessed, from being necessary or natural consequences.

PATTESON, J. We must take this case as it is stated, although we do not quite see what question is submitted to us. We can only notice objections that were made at the trial. We adopt this rule when applications are made for new trials in the ordinary course, and much more should we do so when we sit as a court of error, which is the character of the present court. I do not think we have power to alter the amount of damages, as they do not go to the judgment. By sect. 14 of stat. 13 & 14 Vict. c. 61, the power of appeal is given

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where a party is dissatisfied with the determination or direction of the county court judge in point of law, or upon the admission or rejection of any evidence. As to the first objection, the case of *Muschamp v. The Lancaster and Preston Junction Railway Company* is directly in point; and if carriers receive a package to carry to a particular place, whether they themselves carry it all the way or not, they must be said to have the conveying of it to the end of the journey, and the other parties to whom they may hand it over are their agents. We must adhere to this principle, and the company are clearly liable, unless the facts show that their responsibility has determined. Their not having taken the amount of the carriage is immaterial, and is explained by the fact of their not knowing what that amount would be. Chevins appears to have been the agent of the defendants; he receives the parcel to carry it to Cardiff, and makes out an invoice, which the defendants have refused to produce. Now, putting these circumstances together, there is abundant evidence that they contracted to carry the package to Cardiff, and they were guilty of negligence in detaining it at Bristol. Then comes the question of damages. The plaintiff had put his damages upon a right principle, for he said the goods were made for a special purpose, which has been defeated by the negligence of the defendants, and they have become useless. But he had the chance of a prize, which he had lost through this carelessness, and called witnesses to prove the probability of his obtaining that prize; the defendants objected, and said, "You ought to produce the persons who were appointed to award the prize." But how could the testimony of these persons be said to be the best evidence? They were not bound to attend and examine the models; the plaintiff might not have been able to have procured their attendance; but he does produce two parties, who say that these models were better than the others exhibited. That evidence was clearly receivable if the measure of the damages was correct; and no objection was taken that it was not. There was a distinction between this case and those cited in the argument.

ERLE, J. The first question is, whether there is any evidence of the defendants having contracted; and I think the person to whom the package was delivered must be taken to be the agent of the company. Then, having received a parcel to be conveyed to Cardiff, when their line only extends to Nottingham, do they make themselves liable for its carriage beyond their own line? This question was much considered in *Muschamp v. The Lancaster and Preston Junction Railway Company*, and I think it was there properly decided, that where goods are received at one terminus for conveyance to another, the company are answerable for all the intermediate termini, and the receipt of such goods is *prima facie* evidence of such liability. Then what is the amount of damages to which the plaintiff is entitled? He says he has lost the chance of one hundred guineas. I have had great doubts whether that chance was not too contingent and remote to be the subject of damages; but we are here as a court of appeal, and the case laid before us does not advert to that point; on

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the contrary, the defendants say that the plaintiff ought to have proved that he would actually have had the prize. Then they object to the evidence; but such objection goes only to the weight, and not to the admissibility, of the evidence. We give no opinion as to the question of remoteness of the damages.

*Judgment affirmed with costs.*¹

¹ The principle adopted in *Muschamp v. The Lancaster and Preston Junction Railway Company*, 8 Meeson & Welsby, 421, and affirmed in this case, that common carriers receiving goods directed to a place beyond the terminus of their own line, without limiting their liability by any special contract, are *prima facie* responsible for any loss, although it happened beyond the terminus of their line, was adopted in this country, in the case of *St. John v. Van Santvoord*, 25 Wendell, 661, (1841.) See also *Weed v. Schenectady and Saratoga Railroad Company*, 19 Wendell, 534, (1838.) *Bennett v. Flyaw*, 1 Florida, 403.

Later cases have said that this responsibility is only *prima facie*, however, and may be controlled by proof of general usage among carriers, whether such usage was known to the person sending the goods or

not; and it has been held, that if there is a uniform usage to transport the goods only to the limit of the carrier's line, and then forward them by some regular conveyance, that the carrier receiving the goods is not responsible, *as carrier*, if they are lost beyond his own line, but his liability is that of a *forwarder* only. *Van Santvoord v. St. John*, 6 Hill, 158, (1843;) cited and approved in *Farmers and Mechanics Bank v. The Champlain Transportation Company*, 18 Vermont, 140, (1846.) The language of *Patteson, J.*, in this case of *Watson v. The Ambergate, &c., Railway Co.*, that "the company are clearly liable, *unless the facts show that their responsibility has determined*," would seem to support the same general doctrine, that such liability may be controlled.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER.

FROM AND AFTER MICH. TERM, 14 VICT., A. D. 1850.

SOMERVILL v. HAWKINS.¹

Michaelmas Vacation, December 14, 1850.

Slander — Privileged Communication — Evidence of Malice in Fact.

Privileged communications comprehend all statements made *bona fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the person making them.

A communication being shown to be privileged, it lies on the plaintiff to prove malice in fact; in order to entitle him to have the question of malice left to the jury, he need not show circumstances necessarily leading to the conclusion that malice existed, or such as are inconsistent with its non-existence, but they must be such as raise a probability of malice, and be more consistent with its existence than with its non-existence.

The plaintiff had been a servant to the defendant, and dismissed by him on a charge of theft. He afterwards came to the defendant's house to be paid his wages, and had some communication with the defendant's servants, on which occasion the defendant said to his servants, "I discharged that man for robbing me; do not speak any more to him, in public or private, or I shall think you as bad as him." —

Held a privileged communication, and that there was no evidence of malice to go to the jury.

CASE for slander. The first count of the declaration alleged that the defendant, in the presence and hearing of B. S. and J. C., the defendant's servants, and of divers other persons, maliciously spoke and published of the plaintiff the false, scandalous, malicious, and defamatory words (which were then set out, with the proper innuendoes) as follows: "I discharged that man for stealing; he's a thief, and if ever you (B. S. and J. C.) speak to him again, or have any thing to do with him, I shall consider you as bad as him, and shall discharge you." Whereby, &c. The defendant pleaded, first, not guilty; sec-

¹ 15 Jur. 450.

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only, a justification, alleging that the plaintiff had stolen a cask of mustard belonging to the defendant. At the trial, before Wilde, C. J., at Guildhall, on the 15th of February, 1848, it appeared in evidence that the plaintiff had been in the service of the defendant, and had been dismissed one Thursday on a charge of theft; that he came on the following Saturday, as usual, to the defendant's premises, to be paid his arrears of wages, and had some communication with the defendant's servants, on which occasion the slander charged in the declaration was spoken by the defendant to his servants: "*I discharged that man for robbing me; do not speak to him any more, either in public or private; if you do, I shall think you as bad as him.*" At the close of the plaintiff's case, the counsel for the defendant submitted that the plaintiff must be nonsuited, as the communication, from the circumstances, was privileged, and no malice in fact had been proved. The plaintiff's counsel contended that there was evidence of malice to go to the jury. The learned judge thought not, but offered to go on, and try the issue on the plea of justification, which the plaintiff declined, and elected to be nonsuited. A rule *nisi* was afterwards obtained by the plaintiff for a new trial, on the ground of misdirection.

Byles, Serj., (May 29, 1849,) showed cause. The chief justice was right in his ruling on both points. First, this was a privileged communication; and, secondly, there was no evidence of malice to go to the jury. In *Child v. Affleck*, 9 B. & Cr. 403, Tenterden, C. J., did more than the chief justice in this case; if the latter had nonsuited the plaintiff at once, he would have done right. The communication was from the defendant to his *own servants*. The defendant was clearly interested in preventing the natural and probable consequence of his servants associating with a thief, viz., the loss of his own property. The defendant had also a moral duty to protect his servants from contamination, and the existence of a moral duty, whether of a public or private nature, is sufficient to render a communication privileged. *Coxhead v. Richards*, 2 C. B. 569. *Pater v. Baker*, 3 C. B. 831. *Toogood v. Spyring*, 1 C. M. & R. 181, governs this case, and lays down the correct rule, that a communication injurious to the character of another is not, in law, malicious, "if fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned." The communication was, in this case, therefore, privileged; there was no evidence of malice in fact to go to the jury. In *Child v. Affleck*, no question arose as to whether the verbal statements were privileged, as they were not charged in the declaration; but the court held them not evidence of malice, as they were such as the defendant, from the circumstances, would be likely to make, without any malicious motive. So here, it was natural that the defendant should make the statement he did, both for his own and servants' sake, without any malicious feeling towards the plaintiff, and therefore the judge was right in withdrawing the question of malice from the jury.

E. James, in support of the rule. First, this was not a privileged communication in itself; and, secondly, if it was privileged, the terms of it, and the circumstances under which it was made, ought to have been left to the jury, in order that they might say whether it was malicious or no; and malice might certainly have been inferred from the way in which the communication was made. No communication is privileged unless made *bona fide*, in answer to inquiries as to character, or where there is a duty on the part of the person to make it.

[*Maule, J.* That is too strict; there are many instances in which volunteer statements are held privileged.]

The occasion here was not privileged; the plaintiff was on the premises for a lawful purpose; he was there to receive his arrears of wages, at the usual time and place, and there is no pretence for saying he would then communicate evil to the other servants.

[*Maule, J.* The only question is, whether, the defendant having *bona fide* said this of the plaintiff, living in the neighborhood, and with whom the servants were likely to associate, it is privileged.]

It is a fallacy to say that there was even a moral duty, either public or private, on the part of the defendant, to caution his servants against the plaintiff, for fear he should contaminate them. (Judgment of Cresswell, J., in *Coxhead v. Richards*, 2 C. B. 604.) Secondly, even assuming this to be a privileged communication, the lord chief justice ought to have left the question of malice to the jury, as in *Pattison v. Jones*, 8 B. & Cr. 578. The statement itself intrinsically contained evidence of malice. *Wright v. Woodgate*, 2 C. M. & R. 573, is an authority to the full extent, that though the fact of the defamatory matter having been spoken under circumstances that rebut the *prima facie* inference of malice, and throws upon the plaintiff the *onus* of proving malice in fact, yet he is not obliged to prove it by *extrinsic* evidence; he has still a right (which the plaintiff here demanded at the trial) to require that the alleged defamatory statement itself be submitted to the jury, in order that they may judge whether there is any evidence of malice on the face of it. *Padmore v. Lawrence*, 11 Ad. & El. 380, is to the same effect. Mr. Starkie, in his book on Libel and Slander, vol. 1, p. 292, "On Malice in Fact," says, "As, on the one hand, it would be contrary to common convenience to fetter mankind in their ordinary communications by the apprehension of vexatious litigation; so, on the other, would it be highly mischievous to allow men to inflict the most cruel injuries to reputation and character with impunity, under the cloak and pretence of discharging some duty to themselves or to society, when they were, in fact, actuated by the most malicious intentions." Here the defendant took the opportunity of the plaintiff being lawfully on his premises maliciously to utter the slander complained of, in answer to no inquiries, and in discharge of no duty.

Cur. adv. vult.

MAULE, J., (December 14, 1850,) delivered the judgment of the court.¹ This was an action for words imputing theft spoken by the

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defendant of the plaintiff. The defendant pleaded not guilty, and a justification. At the trial, before Wilde, C. J., it appeared that the plaintiff had been in the service of the defendant, and had been dismissed on a charge of theft; that he afterwards came to the defendant's house, and had some communication with the defendant's servants; and that the words in question, "I have dismissed that man for robbing me; do not speak to him any more, in public or in private, or I shall think you as bad as him," were spoken by the defendant to his servants. The lord chief justice was of opinion that this was a privileged communication, and that there was no evidence of malice, and that the verdict must be found for the defendant on the general issue; but he offered to go on, and try the issue on the justification. This the plaintiff declined, and thereupon the lord chief justice directed a nonsuit to be entered. The plaintiff having obtained a rule *nisi* for a new trial on the ground of misdirection, it was contended for the plaintiff, upon the argument showing cause, that the lord chief justice was mistaken in both respects — *i. e.*, that the communication was not privileged, and that there was evidence of malice. But we think that the case falls within the class of privileged communications which is not so restricted as it was contended on behalf of the plaintiff. It comprehends all cases of communications made *bona fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words. In this case, supposing the defendant himself to believe the charge, — a supposition always to be made when the question is, whether a communication be privileged or not, — it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff, as such association might reasonably be apprehended to be likely to be followed by injurious consequences, both to the servants and to the defendant himself. We think, therefore, the communication in question was privileged — *i. e.*, it was made under circumstances which rebut the presumption of malice, which would otherwise arise from the nature of the words used. That presumption being rebutted, it was for the plaintiff to show affirmatively that the words were spoken maliciously; for the question, being one the affirmative of which lies on the plaintiff, must, in the absence of evidence, be determined in favor of the defendant. On considering the evidence in this case, we cannot see that the jury would have been justified in finding that the defendant acted maliciously. It is true, that the facts proved are consistent with the presence of malice as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury, for the existence of malice is consistent with the evidence in all cases except those in which something inconsistent with malice is shown in evidence; so that to say that in all cases where the evidence was consistent with malice it ought to be left to the jury, would be, in effect, to say that the jury might find malice in any case in which it was not disproved, which would be inconsistent with the admitted rule, that in cases of privileged communications malice must be proved, and therefore its absence presumed till such proof is given.

Whitaker v. Crocker.

It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence. In the present case the evidence, as it appears to us, does not raise any probability of malice, and is quite as consistent with its absence as with its presence; and considering, as we have before observed, that the mere possibility of malice which is found in this case, and in all cases where it is not disproved, would not be sufficient to justify a jury in finding for the plaintiff, we think the lord chief justice was right in not leaving the question to them; and, consequently, that this rule must be discharged.

Rule discharged.

WHITAKER v. CROCKER.¹

Hilary Term, January 22, 1851.

Practice — Distringas — Contradictory Affidavits.

The court refused to set aside a *distringas* on affidavits contradicting the original affidavit, which was sufficient, if true, on which the *distringas* was obtained.

LUSH moved for a rule to set aside a *distringas* to compel an appearance upon an affidavit expressly denying material facts stated in the original affidavit upon which the writ was obtained, but he admitted that the original affidavit was sufficient if true.

Brough v. Eisenberg, 19 L. J., Q. B. 22; *Ensor v. Griffin*, 7 C. B. 781; and *Lewis v. Padwick*, 14 Jur. 226, were cited.

Per curiam. This point has been already decided by this court in *Lewis v. Padwick*. There may be inconveniences on both sides, but the law has elected between them. If a *distringas* be obtained upon a false affidavit, the only remedy is by an indictment for perjury.

Rule refused.

¹ 15 Jur. 385.

Bogg v. Pearse & another.

BOGG v. PEARSE & another.¹

Hilary Term, January 16, 1851.

*Statute — Local Act — Commissioners — Officer — Appointment —
Salary — Contract — Remedy.*

Where commissioners under a local act have power to appoint officers at a salary to be paid out of the rates raised, the appointment does not create a contract on the part of the commissioners to pay the salary. Therefore an *indebitatus* action will not lie against them for salary; but a *mandamus* or an action on the case is the proper remedy.

ASSUMPSIT, by T. G. Bogg against J. Pearse and J. Curling, two of the commissioners for the time being, appointed and acting as such under the statute of the 8 & 9 Vict. c. 177, intituled "An Act for more effectually paving, cleansing, lighting, and otherwise improving the parish of St. Mary Magdalen, Bermondsey, in the county of Surrey."

The declaration stated that the said commissioners for the time being, appointed and acting as such commissioners under and by virtue of the statute, on the 17th of July, 1850, were indebted, as such commissioners as aforesaid, to the plaintiff in 500*l.*, for wages or salary then due and of right payable by and from the said commissioners, as such, to the plaintiff, for and in respect of his having before then held and filled, for a certain long space of time before then elapsed, the office of street-keeper in and for the parish of St. Mary Magdalen, Bermondsey, in the county of Surrey, under and by virtue of an appointment of him as such street-keeper as aforesaid, at wages or salary in that behalf before then duly made by the said commissioners, under and by virtue of and according to the provisions of the said act of Parliament.² And the said commissioners, as such, afterwards, to wit, on the day and year aforesaid, in consideration of the premises, promised the plaintiff to pay him the said sum of money on request.

Plea, as to so much of the sum in the declaration mentioned as is claimed by the plaintiff, for wages due and owing to him from the said commissioners, from the 4th of December, 1849, until the 27th of May, 1850, that is to say, as to the sum of 35*l.*, parcel of the sum of money in the said declaration mentioned, and which, in and by the said declaration, is claimed by the plaintiff as wages or salary due and payable by and from the said commissioners, as such, to the plaintiff, for and in respect of his having held and filled the office of street-keeper in and for the parish of St. Mary Magdalen, Bermondsey, in the county of Surrey, under and by virtue of an appointment of him as such street-keeper before then duly made by the said com-

¹ 20 Law J. Rep. (n. s.) C. P. 99.

² It is enacted by the 42d section of the act, 8 & 9 Vict. c. 177, that the commissioners shall from time to time appoint a treasurer, clerk, surveyor, collector, and assessor, beadle, street-keeper, and such other officers as they shall think fit, with such salaries and allowances as they think reasonable, and may remove such treasurer, &c., and appoint others in their stead.

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missioners; that the plaintiff ought not to have or maintain his aforesaid action against them in respect of the last-mentioned sum of 35*l*., because they say that before the said appointment of the plaintiff to be street-keeper in the said parish by a certain act of Parliament, &c., and which hath ever since been and still is in full force and effect, the management of all the streets within the said parish, and the foot pavements thereof, (except turnpike roads, so long as they should continue turnpike roads,) was vested in the said commissioners in the said declaration mentioned. And by the said act it was, amongst other things, enacted, that every person should be liable to a penalty of not more than 40*s*., who, in any street or public place within the said parish, should place or leave any furniture, goods, wares, or merchandise, or any cask, tub, basket, pail, or bucket, or place or use any standing place, stool, bench, stall, or showboard, on any footway. And the defendants say that afterwards, and whilst the said act was in full force as aforesaid, to wit, on the 23d of September, 1845, the plaintiff was appointed street-keeper within the said parish by the said commissioners, as in the said declaration mentioned, and it then became the duty of the plaintiff, as such street-keeper, to take care that no person should place or leave any furniture, goods, wares, or merchandise, or other things above mentioned, on any footway within the said parish, and to inform the said commissioners of any person whom he should know to have committed such offence. But the defendants say that afterwards, to wit, on the 6th of November, 1849, complaint was made to the said commissioners that the plaintiff, so far from observing and performing his duty in that behalf as such street-keeper as aforesaid, theretofore, and whilst the said act was in force as aforesaid, to wit, on the day and year last aforesaid, allowed and permitted divers persons, to wit, one Thomas Hughes and Ann his wife, one Thomas Woodland and one Benjamin Haydon, respectively, to place divers goods, wares, and merchandise upon certain public footways in the same parish, (the same not being turnpike roads,) and to expose the same there for sale, and to leave and continue the same so exposed upon the said footways for a long space of time, to wit, for the space of ten hours, and that the plaintiff then took and received from the said several persons certain gratuities in money for so allowing and permitting them to do so, contrary to his duty in that behalf; and thereupon the said commissioners appointed a committee of members of their own body to inquire into the charge so made against the plaintiff, and to report on the same, which said committee, after examining the said several persons in the presence of the plaintiff, then reported to the said commissioners that in pursuance of the reference made to them they had carefully examined Mr. Woodland, Mr. Haydon, and Mr. Hughes, and caused their statements to be taken down in writing, and the several statements having been read over to the complainants (meaning the persons last aforesaid) in the presence of the said Thomas George Bogg, (meaning the plaintiff,) they severally signed the same, and offered to confirm the same on oath; and, although the said Thomas George Bogg entirely denied the statements and charges so

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made, the said committee then stated they believed the testimony given by the complainants and so by them offered to be confirmed on oath; and that they were therefore of opinion that the said Thomas George Bogg had taken and accepted gratuities or rewards from the complainants, with a view of permitting them to continue to expose their goods upon the pavement, so as to cause an obstruction thereon and in contravention of his duty; and the said committee then further stated that they were also of opinion that the said Thomas George Bogg had not impartially or efficiently executed his duties as street-keeper, and they, therefore, recommended that he should be suspended from the further performance of his duties, and that the next meeting of the said commissioners should be made special, for the purpose of revoking his appointment and salary or allowance as superintendent or street-keeper to the said commission; and the defendants, in fact, say, that upon the said report being heard and read at the meeting of the said commissioners, holden on the 4th of December last aforesaid, the said commissioners took the same into their consideration, and the same was then, by the said commissioners, confirmed and adopted, and the plaintiff was then, by the said commissioners, suspended from the further performance of his duties as street-keeper; and afterwards, to wit, on the day and year last aforesaid, the said commissioners rescinded the appointment of the plaintiff as street-keeper as aforesaid, and removed him wholly from his said office, of all which the plaintiff then had notice. Verification.

Special demurrer, assigning for causes, among others, that the plea amounted to the general issue, and that it did not show any sufficient ground for dismissing the plaintiff.

Lush, in support of the demurrer. The plea is bad, in the first place, because it amounts to the general issue. It means that the wages claimed by the plaintiff were not due because he had been suspended. In the next place, if the plaintiff had an office under the act, the plea does not show a good ground for his dismissal. It does not even allege that he had misbehaved, but only that complaints had been made, and that the commissioners were of opinion that he should be suspended. If the plaintiff did not take an office under the act, and the case is only one of master and servant, then the plea is an argumentative denial of the debt alleged. Again, the plea is bad for attempting to limit the effect of the declaration. The plaintiff claims 500*l.* for wages. The defendant pleads as to so much, in respect of wages from the 4th of December, 1849, to the 27th of May, 1850; but there is nothing in the declaration to show that it makes any claim in respect of that time.

[*Servis*, C. J. How does it appear that any of the commissioners are liable?]

The 38th section of the act 8 & 9 Vict. c. 177, provides that any two commissioners or their clerk may sue or be sued.

[*Cresswell*, J. Does the act show that the commissioners for the time being are liable to an action in respect of an appointment by former commissioners?]

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The commissioners are secured against personal liability by the 37th section.

[*Maule, J.* It may be that the commissioners having funds are bound to pay the salary on application, but it does not follow from that, there is a debt due.]

Archbold, contra. The declaration is bad. The proper course to adopt in this case would have been a *mandamus*. In *Billington v. Smith*, 2 Bing. 156, it was held that an action would not lie against a clerk of commissioners for injury done by workmen. (He was stopped by the court.)

JERVIS, C. J. I am of opinion that the declaration does not disclose a sufficient cause of action. The plaintiff seeks to recover by virtue of an appointment duly made, and he was bound to show that, otherwise he would not have been entitled to sue two of the commissioners. But the question is, whether the employment creates a debt on which an action can be brought, and I do not think it does. It does not follow that a *mandamus* is the only remedy. In *Cane v. Chapman*, 5 Ad. & E. 647; s. c. 6 Law J. Rep. (N. S.) K. B. 49, an action on the case was held maintainable against a clerk of commissioners for a breach of duty; but it is not necessary to decide that point. It is sufficient to say, that, on the construction of the act, there is no contract which created a debt.

MAULE, J. I think that the declaration is bad, because it does not show any cause of action. It states that the commissioners for the time being were indebted to the plaintiff in 500*l.* for wages for having filled the office of street-keeper by virtue of an appointment before then duly made by the commissioners at a certain salary under the provisions of the act; so that the ground of the promise alleged in the declaration is the appointment by certain commissioners at a certain salary under the act. There is nothing said in this act about agreements with a person appointed street-keeper or any other officer, but the act speaks about appointing them at a salary. All that occurs about agreements comes before that. I think what is meant by the 42d section is, that the commissioners shall appoint a person to an office, and if he chooses to accept it, he may keep it, unless they dismiss him, which they have power to do. But to enable persons to appoint to an office at a salary, by no means constitutes them factors to pay the salary. If those persons have the means of getting into their hands money out of which the salary is payable, it may be that the duty devolves upon them to pay the salary, but that is very different from a contract to pay the salary. There may be a remedy by action, as in the case stated by the lord chief justice, where a clerk of commissioners was held answerable; but the mere exercise of a power to appoint at a salary does not amount to a contract to pay; and if it does not, I think the declaration shows no cause of action. I think, therefore, that not only is the declaration technically insufficient, but that there is a substantial mistake of the remedy.

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CRESSWELL, J. I also think that our judgment ought to be for the defendants. The declaration states that the commissioners were indebted to the plaintiff, and proceeds to show for what. It expresses that the debt was for wages and salary, — it does not say, to be paid by the commissioners, by virtue of an appointment duly made under the powers of the act. We must, therefore, look at the act. The commissioners are authorized to make appointments at salaries. The act does not show that any debt arises on the part of the commissioners, but that they are to pay salaries out of the rates. The proper remedy, therefore, is by an action on the case, as in *Cane v. Chapman*, or by *mandamus*.

WILLIAMS, J. I am of the same opinion. It is necessary, in order to show that the two commissioners are liable, to refer to the act of Parliament; and it seems to me that the declaration shows no cause of action under the act, and is bad on general demurrer.

Judgment for the defendants.

NEWNHAM v. STEVENSON & another.¹

Hilary Vacation, November 15, 1850, and February 20, 1851.

Bankruptcy — Fraudulent Preference — Right to Property as against a Wrong-doer — Jus tertii.

The plaintiff, having seized the goods of S., a trader under a *fi. fa.* issued upon a judgment founded on a warrant of attorney previously given to him by S., took an assignment of the goods from the sheriff by bill of sale. The defendants, who were landlords to S., distrained for rent, and seized the goods under such distress whilst the plaintiff was in possession of them. Three days afterwards, S. filed a petition in bankruptcy, on which he was declared a bankrupt, and assignees were appointed. The assignees did not interfere with or demand the goods of the plaintiff, but they commenced an action of trover against the plaintiff for the conversion of goods. In an action for excessive distress, brought by the plaintiff against the defendants, the jury found that the warrant of attorney was given as a fraudulent preference of the plaintiff over the other creditors, in contemplation of bankruptcy: —

Held, that the property in the goods vested in the plaintiff by the bill of sale, subject to be divested by the assignees; and that, as the assignees had not interfered, the plaintiff was the owner of the goods, and the defendants, being wrong-doers, could not set up the title of the assignees to defeat the plaintiff's action.

This case was argued in Michaelmas term, 1850, by

Bytes, Serj., Gray, and Pashley, for the plaintiff.

James, Q. C., Phipson, and Prentice, for the defendants.

February 20, 1851. JERVIS, C. J., now delivered the following judgment: This was an action on the case. The declaration contained five counts: first, for distraining for more rent than was due; sec-

¹ 15 Jur. 360.

ondly, for an excessive distress; thirdly, for selling within five days; fourthly, for selling the goods for less than they were reasonably worth; and, fifthly, a count in trover. The defendants pleaded not guilty by statute; and to the count in trover, not possessed. At the trial, which was before Wilde, C. J., at the Middlesex sittings, after Trinity term last, the plaintiff abandoned the two last counts. The goods distrained had been the property of Saunders, a trader, and were seized by the sheriff of Surrey, and by him assigned to the plaintiff, by a bill of sale, on the 21st of June, 1849, under a judgment founded on a warrant of attorney given by Saunders to the plaintiff in the month of February preceding. After the assignment, the goods remained on the premises occupied by Saunders; but on the 11th of September, the plaintiff took possession of the goods, and Saunders and his family left the house. On the 5th of October, while the plaintiff was in the possession of the goods, the distress was put in, and on the 8th of the same month Saunders filed a petition in bankruptcy, on which he was declared bankrupt, and on the 22d assignees were appointed. It was not proved at the trial that the assignees had interfered with or demanded the goods of the plaintiff; they had not ratified the act of the defendants, but they had commenced an action of trover against the plaintiff for the conversion of the goods.

For the defendants it was contended, that the execution was a fraudulent preference and an act of bankruptcy, that the property passed to the assignees, and that the plaintiff could not recover. To this it was answered, the *jus tertii* could not, under the circumstances, be set up — at all events, that the plaintiff, being in possession, might maintain this action.

In summing up, the lord chief justice told the jury, that if the warrant of attorney was given voluntarily, on the part of Saunders, for the purpose of securing the plaintiff in the event of bankruptcy, while the rest of the creditors would be unsecured, it was a fraudulent transaction, and void, and in such case the bill of sale would confer no property on the plaintiff, who would not be the owner of the goods, and could not maintain the action. The jury found, that the warrant of attorney was given by Saunders as a fraudulent preference of the plaintiff over the other creditors, in contemplation of bankruptcy. On this finding a verdict was entered for the defendants. In Michaelmas term, brother Byles obtained a rule *nisi* for a new trial on the ground of misdirection, which was discussed in the same term; and we have taken time to consider our judgment, that we might examine the authorities which were cited, and be enabled, by reference to the notes of the evidence and the summing up, to ascertain correctly the facts which raise the point, and the manner in which those facts were left to the jury. It is unnecessary to consider whether the direction of the learned judge was confined to a fraudulent preference, strictly so called, or was intended also to comprehend a transaction intended only to protect the goods against the creditors, but to pass no property to the plaintiff, because the jury found that the warrant of attorney was a fraudulent preference, and on that finding the verdict was entered.

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On the facts proved, and on this finding of the jury, we are of opinion that the verdict ought not to have been entered for the defendants, that the learned judge misdirected the jury, and that the rule for a new trial must be made absolute. It is not necessary to determine whether the bare possession of a mere wrong-doer will, as against a mere wrong-doer, entitle the former to maintain trover or trespass; nor need we, on the present occasion, advert to the distinction in this respect between trespass and trover, recognized by the civil law, and noticed in some cases. Here the finding of the jury imports that Saunders intended the property to pass, and the plaintiff to be preferred to others; therefore the plaintiff must take the property in the goods, and if no bankruptcy had intervened, he would have been an indefeasible owner in possession of the goods, and might have maintained an action. The effect of the bankruptcy upon a fraudulent preference is not to put the goods in the same situation as if they were actually the goods of the bankrupt, so as to vest them at once by the bankruptcy in the assignees, independently of any election on their part; but by the transfer, which is the fraudulent preference, the property vests in the transferee, subject to be divested by the assignees at their election; and the title of that transferee is perfect, except so far as it is avoided by the assignees. The assignees in this case were not proved to have done any thing to effect the plaintiff's title; they had not demanded the goods of the plaintiff; they had not even ratified the defendant's act before the commencement of the action of trover, which may be abandoned at any time, and which assumes that the goods came into the possession of the defendants lawfully, and could not, without more, be taken to be the election on the part of the assignees to avoid the transfer. We need not, therefore, consider the question, which might have arisen had the assignees interfered; until they do interfere, the plaintiff, without doubt, is not only in possession, but is the owner of the goods, and the defendants, being wrong-doers, cannot set up the title of the assignees. The plaintiff is in actual possession, which is *prima facie* evidence of property. The case of the defendants is, that the plaintiff's property was acquired by a transfer from the bankrupt, which the assignees, and they only, have a right to question. The defendants do not show that the assignees have questioned it—that they, or any one else claiming under them, or authorized by them, have claimed the goods. The plaintiff has the sole property, and ought to keep the goods against all others. The cases of *Leake v. Loveday*, 4 Man. & G. 972, and *Hardman v. Willcock*, 9 Bing. 382, *note*, were principally relied on in the argument for the defendants. In *Leake v. Loveday*, the plaintiff brought trover for goods not in his actual possession at the time of conversion: it was, therefore, necessary for him to show a title, which he did, by showing that at one time the goods were his. In answer to this case, the defendants proved that the goods at the time of the conversion were, with the consent of the plaintiff, the true owner thereof, in the order and disposition of the person who had committed an act of bankruptcy, and against whom a commission had issued, and that

 Geralopulo v. Wieler.

the title which the plaintiff once had was at an end, and the consent of the plaintiff, together with the bankruptcy, transferred the property and right of possession to the assignees, as effectually as if the plaintiff had sold and delivered the goods to the bankrupt; in which case, whether the assignees claimed the goods or neglected to do so, the goods would be theirs and not the plaintiff's. There the goods were in the order and disposition of the bankrupt; here they were transferred from the bankrupt by fraudulent preference. The distinction is obvious; and that case, when properly understood, ought not to govern the present case. In *Hardman v. Willcock*, 9 Bing. 382, note, the plaintiff had no property in the goods, special or otherwise; they had been removed by collusion between him and the insolvent, to whom they had belonged; they had been sold by an auctioneer employed by the plaintiff. On an action for money had and received, the assignees interfered; the jury found the plaintiff's possession arose out of a fraud concocted between him and the insolvent. The principal question was, whether the auctioneer was bound to account to the plaintiff, from whom he received the goods; but the court held, inasmuch as the insolvent could not have brought the action against the auctioneer, so neither could the plaintiff, who got possession by fraud between himself and the insolvent. It becomes unnecessary, therefore, to express any opinion on the other point discussed during the argument, namely, whether the assignees could impeach the act of the bankrupt, he himself being the petitioner. For these reasons, we are of opinion that the rule for the new trial should be made absolute.

Rule absolute.

GERALOPULO v. WIELER.¹

Hilary Vacation, January 17 and February 20, 1851.

Evidence — Protesting foreign Bill.

Although, to make a party to a foreign bill liable to a person who takes up such bill for his honor, it is necessary that a formal protest should, previously to so taking up the bill, have been made before a notary, that the payment was made for the honor of such party, yet it is not necessary that such protest should be formally drawn up at the time of such payment, even in the case of payment for the honor of a drawer or indorser. The instrument may be drawn up at any time afterwards, if before trial.

The case of *Vandewall v. Tyrrell*, 1 Moo. & M. 87, explained.

ASSUMPSIT. The first count of the declaration stated, that on the 26th of September, 1849, one Jean Petcheriff, of Odessa, in Russia, made his bill of exchange, and directed the same to the defendant, and required the defendant to pay 260*l.*, three months after date, to the order of Messrs. Buba Freres; that the defendant accepted the bill, and that Buba Freres, under the name of Fratelli Buba, indorsed it to Segniori Fratelli Buba, at Moscow, who indorsed it to J. F.

¹ 15 Jur. 316.

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Fericks, who indorsed it to Giles Loder, who then, by procuration, indorsed it to the London and Westminster Bank, who presented it, when due, for payment, but the defendant did not pay the bill, and the same was afterwards, on the 10th of December, 1849, duly protested for non-payment; that on the 11th of December, 1849, the plaintiff appeared before one James Comerford, a notary public, and declared before such notary that he paid the bill, under protest, for the honor of Segniori Fratelli Buba, the second indorsers, together with 18s. for the charges of the said protest. The second count was on another bill of exchange for 220*l.*, drawn on and accepted by the defendant at three months, as the bill in the first count, and in like manner paid by the plaintiff, under protest, for the honor of Segniori Fratelli. Pleas, *inter alia*; secondly, to first count, that the bill in the first count was not duly protested for non-payment, *modo et forma*; and, thirdly, to first count, that the plaintiff did not pay the said bill in the said first count under the said protest therein mentioned, *modo et forma*. The tenth and eleventh pleas were similar to the second and third pleas, except that they were pleaded to the second count. At the trial, before Maule, J., at the London sittings after last Trinity term, it appeared that the bills had been duly presented, and protested for non-payment on the 10th of December, and that on the 11th of that month they were respectively paid by the plaintiff to the notary, under protest, for the honor of the second indorsers. The protests were regularly drawn up, and were forwarded by post on the 11th of December, addressed to the second indorsers, Fratelli Buba, at Moscow. These protests were not produced at the trial, but secondary evidence was given of their contents, and of the acts of honor, subject to an objection as to their admissibility, raised on the part of the defendant. And the plaintiff also put in evidence duplicate protests, drawn up by the notaries from their books on the 6th of March and 17th of April, 1850, which was after the commencement of the action, though before the trial. The admission of these in evidence was also objected to by the defendant; but the learned judge received them, and a verdict was found for the plaintiff for 495*l.*, with general leave to the defendant to move for a nonsuit, or verdict for the defendant. A rule was accordingly obtained by

Byles, Serj., in Michaelmas term last; against which cause was shown in Hilary term, by

Channell, Serj., and *Bovill*, for the plaintiff; when

Byles, Serj., was heard in support of the rule.

The nature of the arguments is so fully stated in the judgment as to make it unnecessary to set it forth here. The following are the cases which were cited: *Vandewall v. Tyrrell*, 1 Moo. & M. 87. *Goostrey v. Mead*, Bull. N. P. 271. *Orr v. Maginnis*, 7 East, 359. *Beawes's Lex Mercatoria*, pl. 34, 66. *Marius*, 126, 128. *Bayl. Bills*, 262. *Chit. Bills*, 464; 1 Selw. N. P. 380.

Cur. adv. vult.

February 20, 1851. MAULE, J., now delivered the following judgment: After stating the pleadings, his lordship said, Two points were insisted on, on behalf of the defendant: first, that there was no primary evidence of the protest; and, secondly, that secondary evidence was not admissible. As to the first point, it was argued for the plaintiff, in showing cause, that neither of the protests produced were original instruments, and that when the fact recorded in the protest had taken place, and had been duly entered by the notary in his book at the time of the transaction, it was sufficient if the formal protest was drawn up afterwards, and even although after action brought. For this several authorities were cited, and the known course of practice relied on. On the part of the defendant, it was not denied that such was the general rule, but it was contended that this rule was liable to exception in the case of payment, *supra* protest, for the honor of the drawer of the bill; in which case it was insisted that it was not sufficient that the facts recorded in the protest should have taken place, but that a formal instrument of protest must be drawn up or extended before the payment for honor, and consequently that the allegation that the bills were continued and paid under protest was not proved, inasmuch as the protest must be understood to mean such protest as would give a right of action to the person paying for honor; and the authority on which the defendant relied in support of the necessity of extending the protest before payment was that of *Vandewall v. Tyrrell*, which has sometimes been considered as supporting the doctrine contended for by the defendant. That case, as reported in 1 Moo. & M. 87, was an action of *assumpsit* for money paid by the plaintiffs to the use of the defendant; the defendant resided in Jamaica, and drew four bills, dated the 9th of September, 1824, for 1500*l.*, on Willis & Co., in London, at nine months after sight; the bills were duly accepted, but were dishonored, and noted for non-payment at the time they became due, the 30th of July, 1825; the plaintiffs, at the request of the acceptors, paid the bills, for the honor of the drawer, on the 8th of August, 1825, and gave notice to the defendant by the first foreign post. In May, 1826, the notary public was instructed to protest the bills for non-payment, which he did; the protest purported to be made before the payment, and in form stated that the plaintiffs were ready to pay for the honor of the drawer; he stated, the custom was to protest formally before payment, but the chief justice said, "The plaintiffs must be nonsuited; they sue on the custom of merchants; that custom clearly is, that a formal protest should be made before payment is made, for the honor of any party to a bill." This report being short, and somewhat obscure, the court took time to consider its authority, and requested the parties to obtain further information respecting it. We have since been furnished with a brief which one of the counsel in the cause held at the trial, and this has thrown much light on the question. It appears from that brief, and the notes of counsel, that the bills in question in that case were duly presented and noted on the 30th of July, 1825, the day they fell due, and that the plaintiffs paid the amount of the bills to the holder on the 8th of August. The payment was

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made by the clerk of the plaintiffs, no notary being present, and nothing, as far as appeared, being said by the clerk, when he made the payment to the holder, as to paying for the honor of any person. There was, undoubtedly, no intervention of a notary with regard to this payment until May, 1826, when the plaintiffs applied to the notary who had protested the bills for the holder, and the notary then drew up acts of honor on the same papers as the original protests for non-payment. The protests for non-payment were in the usual form, and stated that the notary, on the 30th of July, 1825, presented the bills to the acceptor, who refused payment. The acts of honor were not dated, but followed the signature of the notary to the protest for the non-payment, and were in these terms: "Afterwards, before me, the said notary, and witnesses, appeared Messrs. Vandewall & Tippler, of London, merchants, and declared that they were ready and willing to pay the bill of exchange before protested, under protest, for the honor and upon the account of Joseph Tyrrell, Esq., the drawer of the said bill, holding nevertheless the said Joseph Tyrrell and the acceptors of the said bill, and all others concerned, always bound and obliged to them, the said appearers, for the reimbursement in due form of law, and according to the custom of merchants. *Quod attestor.*" Signed by the notary. The notary stated in evidence, according to the notes of counsel at the trial, that when payment is made for the honor of the drawer, the protest is made before payment. The same note represents Lord Tenterden as saying, "You must recover by the custom of merchants; you have not complied with it by protesting your bills before payment." Thereupon the plaintiffs were nonsuited. It appears, therefore, that in this case the plaintiffs paid the bills on the 8th of August, 1825, without declaring to the notary, or otherwise, that they paid for the honor of the drawer, and attempted to remedy that omission by procuring an act of honor to be drawn up nine months after the fact recorded by the notary in that document — that is, the declaration by the plaintiffs of their readiness and willingness to pay for the honor of the drawer never having actually taken place. Now, it is part of the mercantile law respecting payments for honor, that they must be preceded or accompanied by the declaration, made in the presence of the notary, for whose honor he pays the bill, which should be recorded by the notary either on the protest, or on a separate instrument. Beaves on Bills of Exchange, pl. 27. Marius, 128. It would, indeed, be contrary to the general principles of law and justice, if a person who made a payment, or did an act simply without limit or qualification, could afterwards, by a subsequent declaration, limiting or qualifying its effect, affect the rights of others.

No person, therefore, paying money simply to the holder of a bill, could, by the general rules of law, by a subsequent declaration cause a payment so made to assume the character of a payment for honor. The custom of merchants requires the declaration, which is to qualify the payment, to be made in the presence of a notary. In the case of *Vandewall v. Tyrrell* there was a substantial omission of the declaration in the presence of the notary, which is necessary to give the payment the quality of a payment for honor, and not merely an omission

to draw up the formal statement of such declaration; and this substantial omission was a clear ground of nonsuit, and the decision may be sustained on that ground. But it also appears that it actually proceeded on that ground. The formal protest which Lord Tenterden, as reported in Moody & Malkin, says should be made before payment for honor, and the protesting the bills before payment, mentioned in the note of counsel of which Lord Tenterden said, "You have not complied with it by protesting your bill before payment," are to be understood, not of the protest for non-payment, or not of that only, but either of the protest and declaration before the notary that the payment is for honor, together, or of that declaration alone. In the report in Moody & Malkin the reporters seem to have considered the protest for non-payment and act of honor as one instrument; which they might naturally do, as they were on the same paper; and it was the plaintiffs' interest to treat the protest and act of honor as one instrument. The language of the reporters is, "The protest purported to have been made before the payment, and in form asserted that the plaintiffs were ready to pay, for the honor of the drawer." Now, the protest for non-payment bore date the 30th July, 1823, long before the payment, and it is in the act of honor, and not in the protest for non-payment, that the assertion of readiness and willingness is contained; the reporters, therefore, in speaking of the protest, must mean either the thing itself, or the act of honor alone; in either case the word "protest," as used by them, must comprehend the instrument which contains the assertion of readiness and willingness to pay; and Lord Tenterden, in speaking of a formal protest, must be understood as speaking of such formal declaration before a notary as is before mentioned. Lord Tenterden is represented in the note of counsel as saying, "You have not complied with the custom of merchants, by protesting your bill in time." This seems to point to an omission of something which, according to the usual course, the plaintiffs would have to do, and is more properly applicable to the omission of the notarial declaration, which they ought to have made before payment, than to any omission of drawing up the protest for non-payment, supposing such omission to have taken place. Protesting the bill for non-payment was a thing to be done, not by the plaintiff on the 8th of August, but by the holder on the 30th of July. It is nowhere stated, in express terms, at what time the protest for non-payment in the case of *Vandewall v. Tyrrell* was drawn up or extended; there is no doubt the bills were protested for non-payment on the 30th of July, the day they became due; and probably the protest was drawn up before the payment, for it appears that the payment was made on the 8th of August, in order to prevent the bills being sent to Jamaica, under protest, by the packet, which sailed on the 9th. The brief of the plaintiffs states that "the bills, on being dishonored, were regularly protested by the holder and indorsee, Mr. Simon Taylor, of London, for non-payment, and the bills of exchange and protests are as follows." Then it sets out the bills and protests for non-payment, and it afterwards says, "The parties applied to the notary who had originally protested the bill to prepare the extension

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of the act of honor, and he prepared it on the same sheet of paper as the original protest." There seems no doubt, from these circumstances, that the protests for non-payment had been extended before payment, and were on the 8th of August in the hands of the holder, Simon Taylor, who was about to send them to Jamaica the next day. We have minutely examined this case, because it has sometimes been referred to as affording the high authority of Lord Tenterden to a proposition which introduces an inconvenient and anomalous exception to the general rule with respect to notarial instruments, that a duplicate made out from the original or protocol in the notarial book is equivalent to the original made out at the time of the entry in the book. It appears on this examination, that that case decides only, in conformity with the general law, that a subsequent declaration cannot qualify a previous act, but that in order to have such effect the declaration must precede or accompany the act, in conformity to the law of merchants; and that in cases of payment for honor, the declaration must be formally made before the notary. There is, therefore, nothing in that decision which establishes any exception to the general rule, or prevents its application to the present case; and we are of opinion that the bills having been, in fact, duly protested, and a declaration that payment was made for honor having been duly made before the notaries, and these facts recorded in the usual way in the notarial registry before payment, the duplicates produced at the trial were originals, and equivalent in all respects to the duplicate which was sent to Russia, and that it was not necessary to prove the contents of the last-mentioned duplicate. Taking this view of the question raised in argument, it becomes unnecessary to determine the second question, whether the contents of the protest forwarded to Moscow might be proved by secondary evidence, inasmuch as in whatever way that question would be decided, our determination of the first question would entitle the plaintiff to have the rule discharged.

Rule discharged.

TAPLIN v. FLORENCE.¹

Easter Term, April 25, 1851.

Auctioneer — License to sell on the Premises — Revocation of Authority.

Where the owner of premises, who has employed an auctioneer to sell his goods thereon, revokes his consent to the auctioneer remaining on the premises, the latter has no right to continue there, though he has incurred expenses in allotting the goods, and though he remains only to complete the sale by delivering the goods to the purchasers.

TRESPASS. The declaration was for assaulting the plaintiff and expelling him from certain rooms and premises, wherein he was

¹ 20 Law J. Rep. (n. s.) C. P. 402.

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engaged in the sale and delivery of certain goods, by him sold by public auction as an auctioneer.

Plea, that the defendant, before and at the said time when, &c., was possessed of a certain building, counting-house, and premises, with the appurtenances, situate, &c., and being so possessed, the plaintiff, just before, &c., was unlawfully in the said building, counting-house, and premises, to wit, the said rooms and premises in the declaration mentioned, the same being parcel of the said building, counting-house, and premises, and the plaintiff was then, with force and arms, making a great noise and disturbance therein, without the leave or license, and against the will, of the defendant. The plea then justified the assault and expulsion of the plaintiff, upon the plaintiff's refusal to depart after being requested to do so. Verification.

Replication, that before and at the said time when, &c., at the time of the retainer and agreement hereinafter next mentioned, he, the plaintiff, was and thence hitherto hath been and is an auctioneer, duly licensed and authorized, according to the form of the statute in such case made and provided, to sell goods and chattels by public auction, for reward and commission to him in that behalf payable; and he, the plaintiff, being such auctioneer, the defendant, before the said time, when, &c., to wit, on the 2d of May, 1850, retained and employed him, the plaintiff, for reasonable remuneration and reward in such behalf, as such auctioneer as aforesaid, to sell by public auction, in and upon the said rooms and premises in the declaration mentioned, certain goods and chattels of the defendant then and therein lying and being; and thereupon and then, in consideration thereof, and that the plaintiff then, at the request of the defendant, undertook and promised him so to sell the said goods on the said premises as aforesaid, and conduct and complete the said sale according to the common usage of sales by auction and the common course of business in that behalf, the defendant then undertook and promised the plaintiff that he should and might so sell such goods as aforesaid by auction in and upon the said rooms and premises, and in and upon the said rooms and premises to come, be, and remain so often and so long, and on such occasions, and for such purposes as should be reasonable and requisite for such sale as aforesaid, and make such noise and disturbance therein as should be necessary and unavoidable, in order to carry on and complete the said sale in and upon the said rooms and premises, according to such advertisements and public announcements as should be published and put forth respecting the said sale, and according to the usage of sales by auction and the usual course of business in that behalf. Averment, that in pursuance of the said agreement the plaintiff forthwith, for the purpose of such sale, catalogued the said goods, and caused advertisements of the sale to be, with the knowledge and permission of the defendant, printed and published; and that the plaintiff incurred and became liable for certain large sums of money, to wit, to the amount of 50*l.*, the defendant well knowing the said several premises respectively. Averment also, that in the said advertisements it was announced and advertised, by such permission of the defendant as

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aforesaid, and according to the usual and regular course of business in such cases, that within a reasonable time, to wit, &c., after the said goods should have been set up for sale and sold by public auction as aforesaid in and upon the said rooms and premises, the respective purchasers of the said goods would have to clear and carry away the same from such rooms and premises, according to the usage of sales by auction. Averment of the sale afterwards of the said goods, and that thereupon and then it became and was the plaintiff's duty, as such auctioneer, to deliver the said goods to the said purchasers respectively, upon receiving from them the purchase moneys for the same. Averment of the plaintiff, along with divers of the said purchasers, being present and assembled upon the said rooms and premises for the purpose of completing the said sale, the plaintiff being there to deliver the said goods respectively to the purchasers upon receiving the purchase moneys, and the said purchasers being there in order to pay such purchase moneys to the plaintiff, and to clear off and carry away from the said rooms and premises the said goods so sold to them as aforesaid; that by reason of the premises there was necessarily some noise and disturbance in and upon the said rooms and premises, but that the plaintiff made and caused no more than was necessary and unavoidable, by reason of the premises before mentioned; of all which the defendant, before and at the time of such request as in the said plea mentioned, had full knowledge; and that the said request in that plea was a request to the plaintiff to cease from making such noise, &c., and to depart from the said rooms and premises before he could have completed the said sale as aforesaid, or deliver the said goods on receipt of the said purchase moneys thereof respectively as aforesaid; wherefore and in accordance therewith, and not otherwise, he, the plaintiff, refused so to cease from the said noise, or so to depart from the said premises, as he lawfully might refuse for the cause aforesaid; and that the plaintiff no otherwise refused to cease from making such noise, &c., or to depart, &c., except as aforesaid, and was ready and willing, and offered forthwith and as soon as possible so to complete the said sale, and to deliver the said goods, and cause the same to be cleared off, and was also then and there ready and willing to depart from the said rooms and premises as soon as the said goods should have been so delivered and cleared off as aforesaid, and then and there requested the defendant to permit him to remain a reasonable and requisite time for the purpose of so completing the said sale as aforesaid, which the defendant wrongfully refused, contrary to the agreement, &c., and expelled the plaintiff from the said rooms, &c., and assaulted the plaintiff, &c. Verification.

Rejoinder, that before the said time when, &c., and whilst the plaintiff was in and upon the said rooms, &c., and before the making of the said request, and before the completion of the said sale, to wit, &c., he, the defendant, revoked, determined, and recalled and put an end to his, the defendant's, license to the plaintiff to remain on or come into the said rooms and premises for the purposes in the said replication mentioned, or for any other purpose whatsoever, and

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then determined and put an end to the plaintiff's authority, as such auctioneer or otherwise, to remain or be in or upon the said rooms or premises for the purposes in the said replication mentioned, or for any other purpose; and that the plaintiff afterwards, &c., without the license and against the will of the defendant, with force and arms remained in and upon the said room and premises, and was there making the said noise and disturbance in the said plea mentioned, being other and different noise and disturbance than as in the said replication mentioned, and that the said request in that plea mentioned was a request to the plaintiff to cease making the unlawful noise and disturbance in the plea mentioned, and to depart, &c.; wherefore, &c. Verification.

Surrejoinder, that under and by virtue of the said agreement and promise in the said replication mentioned, and not otherwise, the plaintiff was employed, as such auctioneer as aforesaid, so to sell the said goods in and upon the said rooms and premises as in the said replication set forth and specified, and by the said agreement or promise he did not agree that the same should be, nor by or according to the said agreement or promise could the same be, lawfully revoked, rescinded, determined, or put an end to without the consent of both parties to the said agreement, nor after the same had been executed, or the said goods put up for sale, and so sold by auction as aforesaid. Averment, that the plaintiff never did consent to any revocation, rescision, or determination of the said agreement, nor agree to the same being revoked, &c., and that the same remained unrescinded and undetermined, and in full force and effect. Averment then of the sale by auction of the goods in lots while the said agreement was so in full force and effect, and before the said supposed revocation in the rejoinder mentioned; and of the payment by the purchasers of the deposit money for such lots to the plaintiff as such auctioneer as aforesaid, and that the said several lots then became and were respectively the property of the said persons to whom the same had been so sold respectively; of all which said several premises the defendant then, and at the time of such supposed revocation in the said rejoinder mentioned, and of the said request in the replication mentioned, had notice. That it then, before and at the time of the said supposed revocation and of the said request, became and was the duty of the plaintiff as such auctioneer as aforesaid, according to the usage of sales by auction, to deliver the said lots respectively to the said purchasers thereof respectively, upon their paying to him the residue of the said sums of money for the same respectively; and that he, the plaintiff, should be and he was accordingly, at a reasonable time in that behalf, and before and at the time of the said supposed revocation, and of the request hereinafter next mentioned, in and upon the said rooms and premises for the purpose of his so delivering to the said persons the said lots respectively, on receiving from them the said moneys for the same respectively; and divers of the said persons were then and there present to receive from him the said lots of goods respectively, upon so paying him the said moneys for the same respectively as aforesaid; and by reason

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thereof the plaintiff was then and there making a little noise and disturbance, but not more than was necessary and unavoidable for the reasons and purposes aforesaid; and he, the plaintiff, was not then in and upon the said rooms and premises, nor making any noise or disturbance therein, for any other purpose whatsoever, save as aforesaid; of all which the defendant then had knowledge. And thereupon and then, after the plaintiff, as such auctioneer, had so sold the said goods as aforesaid, and while he was present in and upon the said rooms and premises for the purpose of so delivering the same as aforesaid, and when he was about so to deliver them as aforesaid, and before a reasonable time, &c., the defendant wrongfully, and without any notice or reasonable cause or excuse whatever, demanded of the plaintiff to desist from so delivering the said goods as aforesaid, and immediately, and before he could deliver the same as aforesaid, to depart from the said rooms and premises, (contrary to his duty as such auctioneer as aforesaid,) which the plaintiff refused to do, as he lawfully might, for the cause aforesaid; and thereupon, &c., the defendant assaulted the plaintiff, &c. Verification.

Special demurrer thereto, on the grounds, *inter alia*, that the matters pleaded are no answer in law to the said rejoinder; that the surrejoinder attempts to plead mere consequences or conclusions of law; and that it is an argumentative denial of the revocation of the license mentioned in the rejoinder. Joinder therein.

Watson, Q. C., (*Manisty* with him,) in support of the demurrer. The surrejoinder is bad, for the reasons pointed out in the special demurrer; but it will be contended on the other side that it appears from the pleadings that the plaintiff was lawfully on the premises, and that, notwithstanding the request of the defendant to depart, the plaintiff had a right to remain there for the purpose of completing the sale, and that the defendant was, therefore, not justified in turning him out. It is shown, however, that before the defendant put the plaintiff out of the rooms he had revoked his license to the plaintiff to remain on the premises, and that it was against the defendant's will that the plaintiff continued to be there. The case of *Wood v. Leadbitter*, 13 M. & W. 838, shows that a parol license, though for a valuable consideration, is revocable, unless the license be coupled with an interest. There the plaintiff had purchased a ticket, issued by the authority of the steward of the Doncaster races, entitling the holder to come into the grand stand during the races; and it was held to be lawful for the steward, without returning the money which had been paid, or assigning any reason, to order the plaintiff out of the stand, and so to revoke the license which had been given to him to be there.

[*Jervis, C. J.*, referred to *Wood v. Manley*, 11 Ad. & El. 34; and *Williams, J.*, referred to *Salter v. Woollams*, 2 Man. & G. 650.]

If the plaintiff relies on an agreement under which he was present as auctioneer, and which could not be rescinded except by mutual consent, it would be a grant which could only be made by deed. *Hewlins v. Shippam*, 5 B. & Cr. 221. It was held also in *Bryan v.*

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Whistler, 8 B. & Cr. 288, that a rector cannot, by parol, give leave to one to have the exclusive use of a vault in a parish church. According to the argument of the other side, a person who employs an auctioneer cannot afterwards get rid of him, because the auctioneer may have incurred some expenses.

[*Jervis*, C. J. This is not like conferring an authority on the plaintiff to enter, but a mere employment for the plaintiff to do something, with a power to enter arising incidentally from the employment. In *Wood v. Leadbitter*, Alderson, B., says, "A mere license, but that which is called a license, is often something more than a license: it often comprises or is connected with a grant, and then the party who has given it cannot, in general, revoke it, so as to defeat his grant to which it was incident." Here the auctioneer says, in defiance of his employer, he will enter and take the goods which he has been selling by auction.

Cresswell, J. May not the owner, if he thinks proper, stop the auctioneer in the sale?]

No doubt he may. *Andrews v. Adams*, 15 Jur. 149, shows that a party may revoke a license or agreement, notwithstanding the expense which may have been incurred thereunder by the other party.

Lydekker, contra. It is submitted, that the defendant had no right to dismiss the plaintiff from his employment as an auctioneer: first, because the plaintiff, as auctioneer, had a license coupled with an interest; and, secondly, because he was in by agreement. The case of *Williams v. Millington*, 1 H. Bl. 81, shows that the auctioneer has a special property and interest in the goods which are intrusted to him to sell, so that he can sue the purchaser for their price. That case was approved of in *Davis v. Danks*, 3 Exch. 435.

[*Jervis*, C. J. The license is to enter on the buildings and premises. What interest has the auctioneer in them?]

The plaintiff had sold the goods, and made himself liable, at the request of the defendant, to the different purchasers of such goods. In order to discharge himself from such liability, he would have a right to the possession of the goods, and consequently to enter the premises for the purpose of taking the goods. But, further, it is contended that the plaintiff was in by agreement, which was something more than a license, and the revocation of the license would be immaterial; the agreement could not be determined without the consent of both parties to it. The plaintiff had under the agreement a license to enter the premises, and he became afterwards entitled to a lien on the goods for the charges which he had incurred in respect of the sale, and which would entitle the plaintiff to hold them until the charges were paid. *Edwards v. Chapman*, 1 M. & W. 231, shows that the agreement could not be rescinded. That was an action for goods sold and delivered, and the court held to be bad a plea which stated that the goods were sold and delivered upon a contract, which it was afterwards agreed between the plaintiff and defendant should be wholly rescinded and annulled. After the goods had been sold the defendant had no right to stop their delivery, for, as between him and the plaintiff and the purchaser, the defendant had the least interest in the goods.

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[*Jervis, C. J.* Because *Williams v. Millington* decides that an auctioneer can sue the purchaser for the price of the goods sold, you infer that it is the duty of the auctioneer to deliver the goods, and that he is bound to do so.]

The purpose of the sale cannot otherwise be carried out.

Watson, in reply. It is assumed, on the other side, that the goods were delivered into the possession of the auctioneer; but the pleadings do not allege this. It cannot be that the auctioneer has a right to go and deliver the goods, and receive the money, against the wish of the owner. Surely the principal may step in, and tell the purchaser to pay the money to him, and not to the auctioneer, and the purchaser would be bound then to pay the principal.

JERVIS, C. J. I am of opinion, in this case, that the defendant is entitled to the judgment of the court. The action is in substance for the assault and expulsion of the plaintiff from certain premises. The defendant justifies this on the ground that the plaintiff was making a noise and disturbance on the premises of the defendant, and therefore he desired him to go away, which the plaintiff refusing to do, he expelled him. The plaintiff says, in answer to this, that he was employed by the defendant, as an auctioneer, to sell the defendant's goods, and that he necessarily made the noise and disturbance by reason of that employment, and that he had the defendant's authority for what he so did. The defendant rejoins that he revoked that authority, and that the plaintiff was therefore not justified in making the noise and disturbance; to which the plaintiff answers by saying, that, before the authority was revoked, he, the plaintiff, had allotted the goods and incurred the expenses for so doing, and that the defendant, therefore, had no right to revoke the authority. The question then is, whether, under the circumstances, the defendant was justified in expelling the plaintiff. Now, the right of the plaintiff is put on two grounds; it is said that he had a license from the defendant, and that the same was irrevocable, being coupled with an interest; and that if not this, then that the right of the plaintiff was by virtue of an agreement, and which, being between two parties, could not be revoked by the act of one only. Now, the substance of the defence is, that the defendant turned the plaintiff out of the premises because the plaintiff was in the defendant's house and premises without authority. If, then, the plaintiff relies on his right to be there by virtue of an agreement, the answer to it is, that the agreement is by parol, and such an agreement only cannot confer on the plaintiff any interest in the house and premises. The question then resolves itself to one on the point mainly relied on, namely, that the plaintiff had a license from the defendant, coupled with an interest. A mere license would be revocable at any time: what is the interest which prevents a license being revoked, is explained in *Wood v. Leadbitter* and *Wood v. Manley*. In *Wood v. Leadbitter*, the court referred to the judgment of *Vaughan, C. J.*, in the case of *Thomas v. Sorrell*, in the course of which the chief justice says, "A dispensation or license

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properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which, without it, had been unlawful. As, a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions, which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting, and cutting down the tree; but as to the carrying away of the deer killed and the tree cut down, they are grants." Therefore the nature of the interest which will confer such a right as cannot be revoked is this, namely, it must be an interest in the thing itself. Now, it is not pretended that the plaintiff had any interest in the defendant's premises where he was making the noise and disturbance, but it is put on the ground that the plaintiff, being employed as an auctioneer, had acquired an interest in the goods, and that, having thereby a special property in the goods, he had a right to enter and be on the premises of the defendant in order to remove such goods. There is no authority for that proposition. The facts are, that the plaintiff was employed for a specific purpose, that is to say, to sell the defendant's goods, and it cannot be contended that that authority could not be revoked, but that the plaintiff had infallibly a right to go on the premises and to sell the goods, whether the defendant wished it or not. The license to the plaintiff to enter and be on the premises was clearly revoked, and there is no authority to show that the plaintiff had such an interest in the matter that the license could not be revoked. In deciding so, we are not infringing on the case of *Williams v. Millington*, which decides that an auctioneer has a special property in the goods which are put into his possession for the purpose of sale, and may bring an action against the purchaser for their price. The original owner may, however, if he thinks proper, come forward and require the purchaser not to pay the auctioneer, but to pay him; and the owner would then, I apprehend, have a right to claim the price of the purchase from the vendee. On these grounds I think that the defendant is entitled to our judgment.

CRESWELL, J. I am of the same opinion. It appears to me to be clear, that the auctioneer has no interest in the goods which would make the license to him to enter on the premises irrevocable. The expenses which had been incurred in this case would not make the license irrevocable, according to the case of *Wood v. Manley*. I think the law has been clearly laid down as to the plaintiff's right to enter by agreement; according to the case of *Hewlins v. Shippam*, no such agreement by parol can confer the right claimed.

WILLIAMS, J. Before the plaintiff was turned out, the license to be on the premises was revoked by the defendant. This was not a license coupled with an interest within the true meaning of the rule, and it might, therefore, be revoked.

TALFOURD, J., concurred.

Judgment for the defendant.

Hughes v. Clark.

HUGHES v. CLARK.¹

Easter Term, April 30, 1851.

Stamp — Lease — Counterpart — Evidence.

In an action of debt for rent on a demise, the plaintiff produced a deed properly stamped as a counterpart lease, and proved the same to have been executed by the defendant:—

Held, that although there was no evidence of any lease having been executed by the plaintiff, the presumption was that there was such; and the deed produced was therefore rightly admissible as a counterpart.

THIS was an action of debt for rent. The plaintiff declared on the indenture of demise, excusing the production of the same as being in the possession of the defendant, and making *profert* of a counterpart thereof executed by the defendant. The defendant pleaded *non est factum*. The cause was tried, before Maule, J., at the Middlesex sittings in the present term, when the plaintiff produced in evidence a deed properly stamped as a counterpart lease, and called the attesting witness, who proved that the defendant executed it. On cross examination, this witness stated that the plaintiff had not executed the counterpart, nor was he aware that the plaintiff had executed any other deed. Upon this it was objected for the defendant, that, as no other deed was shown to be existing, the one produced could not be read as a counterpart, but that it must be considered as the original lease, and required therefore a lease stamp. The learned judge allowed it to be received, and a verdict was found for the plaintiff for 425*l.*, leave being reserved to the defendant to move to set the same aside, and enter a nonsuit, if the court should think that the deed was not properly admissible.

Corrie now moved accordingly, and submitted, that until some evidence was given by the plaintiff of the existence of another deed, and of the one produced being a duplicate, it could not be considered only a counterpart, and receivable in evidence as such. The case arose under the old Stamp Act; and the 37 Geo. 3, c. 19, (which imposes a penalty on an indenture, lease, bond, or other deed not being duly stamped,) declares that no such indenture, lease, bond, or other deed shall be pleaded or given in evidence, or be good, useful, or available in any manner whatever, unless the same shall be stamped as required by the act. In *Garnons v. Swift*, 1 Taunt. 507, two parts of the agreement were both signed by the plaintiff and defendant, and the plaintiff proved that one of those parts, properly stamped, was in the possession of the defendant, who had had notice to produce it, and therefore it was held that the plaintiff might prove the agreement by means of the unstamped one in his own possession. The only case apparently against the defendant is *Paul v. Meek*, 2 Y. & J. 116; but, in fact, that was a different case from the present one. That case only decides that, in an action on a counterpart lease, which

¹ 15 Jur. 430.

Hughes v. Clark.

was proved to have been executed by the defendant, the defendant was precluded from objecting to the sufficiency of the stamp on the lease.

[*Cresswell, J.* Here the declaration being on the demise by the indenture of lease, of which the plaintiff offers to produce a counterpart, the defendant, by his plea of *non est factum*, admits that the plaintiff did demise to him by the deed, but he denies that he, the defendant, executed the counterpart.]

It is submitted that this court will not consider the defendant to be bound by any such admission on the pleadings, if the evidence shows that no other document but the one produced was, in fact, executed, the question being whether such document be properly stamped. [*Pitman v. Woodbury*, 3 Exch. 4, was cited.]

JERVIS, C. J. I am of opinion that there should be no rule in this case. The presumption in this case, as in all other cases of presumption, must depend on the particular circumstances of the case. Here it is found that the defendant executed the deed, with a covenant, which, to be rendered binding, there ought to be a demise to him by deed, executed by the landlord. That demise would be in the possession of the defendant; and, according to the general rule, it would be for him to produce it. Therefore the presumption here is against the tenant that there was another deed executed, and accordingly that which was produced was good as a counterpart. I do not say that it raises any thing more than a presumption against the defendant; but this, however, is sufficient to make the deed, which was produced, admissible.

CRESSWELL, J. I am of the same opinion. The tenant here sets up a deed which ought to be executed by the lessor, as the consideration of the former executing the counterpart. The fair presumption is, that the tenant has had it, and that it was sufficiently stamped. There certainly is no evidence that it was not sufficiently stamped.

WILLIAMS and TALFOURD, JJ., concurred.

Rule refused.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER;
AND UPON
WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER.

FROM AND AFTER MICH. TERM, 14 VICT., A. D. 1850.

MILNES v. DAWSON.*

Michaelmas Vacation, December 5, 1850.

Bill of Exchange — Consideration — Payment to Drawer — Costs on Judgment non obstante veredicto.

To an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded that J. H., the drawer, indorsed the bill to the plaintiff without value or consideration, and that the plaintiff always held it without value or consideration, and that after the bill became due, J. H. accepted certain scrip certificates from the defendant in full satisfaction and discharge of the bill. The plaintiff replied that the bill was indorsed for value and consideration, and upon this issue the defendant had a verdict.

Held, that the plaintiff was entitled to judgment *non obstante veredicto*.

ASSUMPSIT on a bill of exchange. The declaration stated that one J. Hanson made his bill of exchange in writing, and directed the same to the defendant, who accepted it, and that afterwards, he, the said J. Hanson, indorsed the same to the plaintiff.

The defendant pleaded, fifthly, that there never was any value or consideration whatever for the indorsement of the said bill by the said J. Hanson to the plaintiff, and that the plaintiff took and received and hath always held the same without any value or consideration for the same, and that after the said bill became due and payable according to the tenor thereof, and before the commencement of this suit, the said J. Hanson, with the assent and concurrence of the defendant, took and appropriated certain scrip certificates and certificates of shares of and belonging to the defendant in divers railway companies and of great value, to wit, of a value far exceeding the amount of the said bill and of all interest thereon, and of all dam-

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ages by reason of the non-payment thereof, and which certificates had been before then deposited with him, the said J. Hanson, as a security for the payment of the money secured and made payable by the said bill, in full satisfaction and discharge of the said bill, interest and damages. Verification.

The sixth plea was in substance the same.

The plaintiff replied to these pleas respectively, that the bill was indorsed for value and consideration. Issues thereon.

At the trial, the plaintiff had a verdict upon the issues upon the first three pleas. As to the fourth plea, the jury were discharged, and the fifth and sixth pleas were found for the defendants.

J. Brown had, in Michaelmas term, obtained a rule for judgment for the plaintiff *non obstante veredicto* on the fifth and sixth pleas.

Hoggins now showed cause.¹ The bill was in the hands of the plaintiff without consideration and overdue, and his right to sue was destroyed by the settlement with Hanson.

[*Platt*, B. It is not averred that the bill was held for Hanson.

Parke, B. Suppose the bill was given to the plaintiff by Hanson.]

That ought to have been replied. The plaintiff could not have sued Hanson, and he only took a limited right to sue, which was destroyed by the payment. It is quite consistent with the plea that the bill was indorsed after it was due.

[*Parke*, B. Certainly not.]

J. Brown, contra, was not called upon.

PARKE, B. The rule must be made absolute. [His lordship stated the pleas and proceeded.] It is quite inconsistent with the negotiability of bills of exchange that the indorser should transfer the property in the bill and afterwards pay the amount so as to affect the title of his indorsee. If the property in the bill passed, the right to sue passed also. Whether the plaintiff could have sued Hanson is another question, which we are not called upon to decide, but I am inclined to think that he could have done so. A bill of exchange is a chattel, and the gift would be complete by delivery coupled with an intention to give. Had the question been raised at the end of the last century, it is not difficult to say how it would have been decided; but now the question would be treated differently. The old authorities will be found in *Chitty on Bills*, p. 72, and see also *Holliday v. Atkinson*, 5 B. & C. 501. At any rate here the indorsement conferred the title to sue, and payment to the donor affords no answer. We cannot infer that it was indorsed after it was due. If indeed it had been shown that the plaintiff held the bill merely as agent for Hanson, then the payment to Hanson would have sufficed; but there is nothing of the kind stated.

¹ Before PARKE, ALDERSON, PLATT, and MARTIN, BB.

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ALDERSON, B. I am of the same opinion. It is not necessary to say if there was a right of action against Hanson. It may be that such a transfer would not make him liable, but still it transferred all the right Hanson had to sue the previous parties, and if the plaintiff had such right, Hanson had it not, and then payment to him was no payment.

PLATT and MARTIN, BB., concurred.

Rule absolute.

MORTIMER v. HARTLEY.¹

Hilary Term, January 11, 1851.

Devise — Estate Tail — “Or” not construed “and” — Power of Sale.

John W. the elder, being seized in fee of certain freehold estates, by his will, after appointing M. W. and others trustees, and directing the payment of his debts out of his personalty, and giving certain bequests to his wife in lieu of dower, and other directions, devised as follows: Eleventhly, I will that my son John having attained twenty-five years of age be let into possession of all my property real and personal which remains, on this express and unalterable condition, that neither he nor his heirs to the third generation shall have power to sell or mortgage any part of the freehold estate now in my own occupation or in the occupation of S. E. and F. S.; but mark, if the trustees do not sell the coal, but mortgage the estate, I empower John or his heirs to sell it, to pay off the mortgage, but not otherwise; and in like manner, I debar him and his heirs from selling or transferring those cottages with cart-house and appurtenances built on the waste now in the occupation of J. H., J. H., R. M., H. M., J. W., and myself, it being my desire that they should be kept in the Westermans' name. Twelfthly, if it should happen that my son John die without leaving lawful issue, it is my will that my daughter Ann have his share, subject to the same restrictions, limitations and exceptions under which he has it. Thirteenthly, now if it should please God to take away both Ann and John under age, or without leaving lawful issue, I give and bequeath to my brother Joseph Westerman and his heirs forever all those cottages and cart-house built on the waste, occupied by R. M. and others, with their appurtenances. Fourteenthly, I order all that is left to be immediately sold;” and the will then directed certain payments “out of the moneys arising from such sale.”

J. W. the elder was illegitimate, and died in 1826, having had three children, A. W., J. W., and E. W. E. W. died in March, 1826. A. W. survived her father and died in 1829, an infant and unmarried, leaving J. W. the younger, who had not attained the age of twenty-one, her heir at law. J. W. the younger survived the testator and was his heir at law. The said J. W. the younger attained the age of twenty-five in 1838, and died in April, 1842, leaving two children who died infants in 1844 and 1846 respectively, and by his will he devised all his real estates to J. H. and E. D., their heirs and assigns:—

Held, first, that the devisees of J. W. the younger had no estate in the hereditaments devised by J. W. the elder; secondly, that Joseph Westerman had an estate in fee in remainder, under the 13th clause; and thirdly, that the trustees had the power of sale of the remainder in the other tenements not comprised in the 13th clause, after the death of John.

THE following case was sent for the opinion of this court by Vice Chancellor Knight Bruce:—

John Westerman, the father, late of Gilderstone Street, in the parish of Batley, in the county of York, cotton manufacturer, deceased, was, at the time of making his will hereinafter stated, and

¹ 20 Law J. Rep. (N. S.) Exch. 129.

up to the time of his decease hereinafter mentioned, seized in fee simple of certain freehold estates in the county of York, and being so seized, on the 23d of February, 1826, he duly made and published his last will and testament in writing, which was executed and attested in the manner as by law required for passing real estates by devise, and was in the words and figures following, that is to say: "I, John Westerman, of Gilderstone Street, in the parish of Batley, cotton manufacturer, do make this my last will and testament, whereof I appoint my wife Mary Westerman, Joseph Johnson my brother-in-law, Joseph Hartley my brother-in-law, and my friend Samuel Atkinson, of Naphshaw Lane End, in Gilderstone, executors and trustees, with every power that I can give, to act upon the trusts of this my will, which is as follows: First, I order all my just debts, funeral expenses, and the charges incident to the probate and execution of this my will, to be paid with as little delay as possible out of my personal estate. Secondly, I give and bequeath unto my mother, Sarah, the wife of Edward Johnson, of Wortley, the sum of 5s. monthly out of my personal estate during the time of her natural life, the first payment to be made on the first day of the month next after my decease. Thirdly, I give unto my dear wife, Mary, all my right and interest in a mortgage for 200*l.* which William Wates, of Hunslet, owes me. Fourthly, I also give unto my said wife all my right and interest in a 50*l.* subscription which I have paid towards the Leeds and Birchall Road. These two things she accepts in lieu of dower. Fifthly, my wife, Mary, being here settled, it is my will that she occupy the dwelling-house and all my furniture, the swine court and hen-house, together with the garden, just as they are now, rent free, without any molestation whatsoever, until the close of the year 1828; notwithstanding, it is my will that this be either a constant or occasional home to both my daughter Ann and my son John, within the aforesaid time, as their circumstances may require, but I request my said trustees to see that my said children treat their mother respectfully, otherwise she is not bound to find them a home. Sixthly, I will that all my farming stock be sold without delay, all debts due and owing to me (whether private or cotton debts) to be collected with all convenient speed, and all my stock of whatever kind in the cotton trade disposed of, with as little delay as possible, by my trustees. Seventhly, it is my will that the close called Street Close, the stable, the barn, and the workshops shall be let together or in lots until my son John arrive at the age of twenty-five years. Eighthly, I have much tillage, &c., in the stone-pits, and if my lord's agents will consent, I desire this should be let for a fair rent, with a valuation on and off according to the improved state they are in, until John arrive at the age of twenty-five years; but if my lord's agents will not consent, then that they should be farmed to the best advantage until John come to twenty-five years of age. Ninthly, I hereby will and direct that the said rents of my cottages, together with the rents which my other property may be let for, be collected, so that the moneys to be received on account of trade and they may become one, and, after all my debts are paid, may accumulate until John

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attains the age of twenty-five years. Tenthly, when John arrives at the age of twenty-two years, I will and direct that my trustees take 600*l.* and secure it either upon mortgage of freehold or government stock, and pay the interest as and when it is received to my daughter Ann, who will then be twenty-five years of age, during her natural life, and if she be married and have children, to her husband during his life, should he survive her, then the principal to be divided equally amongst their children, and if any shall have died leaving lawful issue, such child or children to have the parent's share; but should Ann die without lawful issue, I will that the 600*l.* be immediately divided, one half to Elizabeth, and the other to John or their heirs. I must here remark, that whatever my personal property with its accumulations falls short of 600*l.*, the real estate must be mortgaged or the coal sold to make up the deficiency, as the trustees may deem best. Eleventhly, I will that my son John having attained twenty-five years of age be let into possession of all my property, real and personal, which remains, on this express and unalterable condition, that neither he nor his heirs to the third generation shall have power to sell or mortgage any part of the freehold estate now in my own occupation, or in the occupation of Squire Ellis and Francis Smith; but mark, if the trustees do not sell the coal, but mortgage the estate, I empower John or his heirs to sell it to pay off the mortgage, but not otherwise; and in like manner I debar him and his heirs from selling or transferring those cottages with cart-house and appurtenances built on the waste now in the occupation of James Halliday, Joseph Hobson, Robert Metcalf, Hannah Marshall, John Wade, and myself, it being my desire that they should be kept in the Westermans' name. Twelfthly, if it should happen that my son John die without leaving lawful issue, it is my will that my daughter Ann have his share, subject to the same restrictions, limitations, and exceptions under which he has it. Thirteenthly, now, if it should please God to take away both Ann and John under age, or without leaving lawful issue, I give and bequeath to my brother Joseph Westerman and his heirs forever all those cottages and cart-house built on the waste occupied by Robert Metcalf and others, with their appurtenances. Fourteenthly, I order all that is left to be immediately sold, and out of the money arising from such sale I will and direct that my trustees pay to my daughter Elizabeth, or her legal representative, the sum of 500*l.*, and the residue, more or less, to be divided equally amongst the children of Elizabeth Mortimer, of Churchwell, my aunt, my mother's children by Mark Snowden, including Joseph Westerman, and the children of my late aunt Susanna Stephenson, share and share alike. Fifteenthly, I will and direct that my said trustees retain to themselves, out of the moneys coming into their hands, so much as is reasonable both for time and expenses, and that they shall not be answerable for any moneys but such as shall really come to them. Sixteenthly, revoking all other wills by me at any time heretofore made, I declare this to be my last will and testament, this 23d day of February, 1826."

The said John Westerman the father was illegitimate, and died on

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the 27th of April, 1826, having had three children only, namely, Ann Westerman, John Westerman, and Elizabeth Westerman.

The said Elizabeth Westerman the daughter died on the 6th of March, 1826, in her father's lifetime, an infant of the age of two years or thereabouts. The said Ann Westerman survived her father, and died on the 26th of May, 1829, an infant, and without having been married, and before the said John Westerman the son attained his age of twenty-two years, and leaving the said John Westerman the son her heir at law. The said John Westerman the son survived the testator, and was his only son and heir at law at his death.

The said John Westerman the son attained his age of twenty-five years some time in the year 1838, and died on the 11th of April, 1842, having had three children only, named John Walter Westerman, who died an infant in his father's lifetime, John Denton Westerman, who died an infant on the 1st of December 1844, and Lydia Elizabeth Westerman, who died an infant on the 19th of April, 1846.

The said John Westerman the son did not in his lifetime do or execute any act or deed whatsoever which had the effect of barring his estate tail, if such were the estate he took under his father's will in the real estates thereby devised, or the remainders or reversions thereupon expectant or depending, but by his last will and testament in writing bearing date the 31st of March, 1842, which was duly executed and attested, he devised all his real estates unto and to the use of the defendants, James Hartly and Edward Denton, their heirs and assigns.

There is not any issue now living of the said John Westerman the son. The said Joseph Westerman and the trustees under the will of the said John Westerman the father are all living.

In the month of September, 1846, a suit was instituted in the Court of Chancery, by the children of Elizabeth Mortimer, the children of the testator's mother, by Mark Snowden, including Joseph Westerman, and the children of Susanna Stephenson, against the trustees under the will of the said John Westerman the father, the devisees in fee of the said John Westerman the son, and her majesty's attorney general, to have the trusts of the will of the said John Westerman the father, in respect to the real estates thereby devised, performed, and carried into execution, and to decide the rights of the parties claiming under or by virtue of the said will; and, on the 9th of February, 1849, the said cause came on to be heard, before the Vice Chancellor Knight Bruce, and the above case was stated, and the following questions put: First, whether the devisees of John Westerman the son have any and what estate in the hereditaments devised or affected by the said will of the said John Westerman the father, or any and which of them. Second, whether, in the events that have happened, Joseph Westerman has any and what estate under the thirteenth clause of the said will of the said John Westerman the father, in the freehold cottages and cart-house built on the waste occupied by Robert Metcalf and others, with their appurtenances. Thirdly, whether, in the events which have happened, any and what person or persons, other than the devisees of the said John Westerman the son, has or have any and what power of selling or appointing, or any or what estate in the

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hereditaments devised or affected by the said will of the said John Westerman the father, or any and which of them.

The case was argued in Hilary term, Jan. 21, 1850, by

Malins, with whom was *Humphrey*, for the plaintiff, and

Elmsley, for the defendant.

The arguments are fully stated in the judgment. The following cases were cited: *Eastman v. Baker*, 1 Taunt. 174. *Right v. Day*, 16 East, 67. *Doe d. Ellis v. Ellis*, 9 Ibid. 382. *Doe d. Usher v. Jessep*, 12 Ibid. 288. *Fairfield v. Morgan*, 2 N. R. 38. *Cur. adv. vult.*

The judgment of the court was now delivered by

PARKE, B. In this case, which was argued before my brothers Alderson and Platt, and myself, we shall certify our opinion to the Vice Chancellor Knight Bruce; and pursuant to the course we usually follow, we proceed to state the reasons for that opinion. The case is this. [His lordship, after stating it, proceeded:] The first point to be determined is, what estate John Westerman the son took under the 11th, 12th and 13th sections of the will. From the 11th section it is clear that the testator intended that his son John should take more than an estate for life, for as he prohibits his heirs from selling, he must mean his heirs to have before they could sell. The only question on this part of the will is, what heirs the testator intended. We think as he prohibits John's heirs to the third generation from selling the real estate in the possession of the testator, Ellis, and Smith, he meant that his son and three generations of his heirs should succeed to all his real estates; and this expression is equivalent to that of "heirs lawfully begotten," which, according to *Nanfan v. Legh*, 7 Taunt. 85, creates an estate tail. The testator in like manner debars John and his heirs from selling the cottages with cart-house, built on the waste in the possession of Halliday, Hobson, and others, and the testator, it being his desire that they should be kept in the Westermans' name. We think the testator means by using the words "in like manner" that the same class of heirs, that is, heirs to the third generation, are to enjoy the cart-house, &c., as we before mentioned, and to carry into effect the desire that the cottages are to be kept in the Westermans' name; if these words stood alone uninfluenced by the context, the estate tail in that property would be an estate in tail male, but the subsequent provisions may qualify the meaning of this expression. The next clause provides, that if John dies without leaving lawful issue, the estate left to John shall go to Ann subject to the *same limitations*, and shows the intent that Ann should have a similar estate tail also, but the desire that the estates should be kept in the Westermans' name cannot be accomplished in her case by giving her an estate in tail male, and if John were held to have an estate tail male, the consequence would follow that John's daughter would be passed over in favor of John's sister, and this is

inconsistent with the words, that one should have the estate *in like manner* as the other. These words naturally meaning that some estate in tail general is given to both, the word "name," in order to put both on the same footing, (which was clearly intended,) must be construed to mean "family" or "right line;" but whether John takes an estate tail male or an estate tail general in the events which have happened, is not material to be decided. We think that each took an estate tail of some kind.

The next clause creates the great difficulty in the case. "If it should please God to take both John and Ann under age, (that is, under twenty-five,) or without leaving lawful issue, I give and bequeath to my brother Joseph Westerman and his heirs forever all those cottages and cart-house, with their appurtenances." Is the word "or" to be understood according to its grammatical meaning, or as the copulative "and"? If the former, these particular lands would go to Joseph Westerman in fee; if the latter, his remainder would be defeated. If the estate has been given to John and his heirs, &c., there are many cases which show that as in ordinary parlance "or" is often used for "and," and as the issue of John and Ann would be both without a provision if they married and died before twenty-five, "or" ought certainly to have been construed as "and," in order to prevent such a consequence. But here the first gift is of an estate and not a fee, and it is contended for the plaintiff, on the authority of Lord Hardwicke, in the case of *Brownsword v. Edwards*, 2 Ves. sen. 243, that that circumstance makes a material difference, and that "or" ought to be read in its ordinary sense. Objections have been taken to the opinion of Lord Hardwicke, and it has been said that he went so far in this case as to hold that "and" ought to be changed into "or" for the purpose of obtaining a result, the opposite of that for which the converse alterations had been made in the cases above referred to. Jarman on Wills, 449. Fearn, 506. *Malcolm v. Taylor*, 2 Russ. & M. 447. In *Brownsword v. Edwards* the estate was devised to trustees till John Brownsword should attain twenty-one, and if he should live to attain twenty-one or have issue, then to John Brownsword and the heirs of his body, but if he should happen to die before twenty-one, and without issue, then over. Lord Hardwicke says, "There is no necessity to alter or supply words, for there is a plain rational construction upon the words, 'if the said John shall happen to die before twenty-one,' and also, 'shall happen to die without issue,' which construction makes the dying without issue to go through the whole, and answers the intent of the testator." It appears, therefore, to have been a mistake to attribute that alteration in the words of the will to Lord Hardwicke; what was said by his lordship seems to be perfectly correct. With respect to the other part of Lord Hardwicke's judgment, we consider it an authority on which we ought to act. The disposition of courts should always be to abide by the words of a will, and to read them in their ordinary grammatical sense. If we do so in this case, and make no alteration whatever, it is possible we may disappoint what we may conjecture to have been one intention of the testator, because it is a reasonable intention to entertain, that

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is, to give a benefit to the issue if their parents should die under twenty-five; but we are sure of carrying into effect a manifest and declared intention of the testator, to give the remainder over to Joseph on the determination of the estate tail; on the other hand, if we change "or" into "and," for the purpose of effecting the conjectured intention to give a benefit to the issue on the death of their parents respectively under twenty-five, we defeat the clear and manifest intention to give the remainder to Joseph on failure of the issue of John and Ann, and cause an intestacy as to that remainder, a circumstance which ought to be avoided. We think, therefore, that we are more likely to carry into effect the intention of the testator, by not departing from the words of the will and that sound rule of construction. If the first limitation had been to John and his heirs, if he should die under twenty-five or without issue, then to Joseph, we should have felt ourselves bound by the numerous authorities on that subject to hold that the disjunctive "or" must be construed as the conjunctive "and." But as none of the authorities apply to an estate tail, and we have Lord Hardwicke's high authority for distinguishing such a case, we are of opinion we ought to do so, and abide by the ordinary sense of the words. If, in this case, any change in the language should be made, the one which would be most likely to effectuate the intent of the testator would be to read the words as if they had been, "and if it should please God to take away both John and Ann under age, or at any time," without issue. By so reading them, the issue would take if their parents died under twenty-five, and Joseph succeed on the determination of the estate tail. But if this cannot be done, we think we should make no change at all; and by so doing are much more likely to construe the will according to the testator's intent than by altering "or" into "and."

The next question is, What becomes of the remainder after the estate tail which did not pass to Joseph under the 13th clause? The direction that all that is left shall be immediately sold would include the remainder. All that is left comprises the residue; and the direction to sell does not exclude the supposition that it was meant to comprise it, though a reversion on an estate tail of little value. *Roe d. James v. Avis*, 4 Term Rep. 605, in which that circumstance was considered as a ground for excepting the reversion, must be considered as overruled, by Lord Eldon, in *Church v. Mundy*, 15 Ves. 403; and *Mostyn v. Champneys*, 1 Sc. 293; s. c. 4 Law J. Rep. (N. S.) C. P. 55. We, therefore, shall answer the questions of the vice chancellor as follows: first, that the devisees of John Westerman the son have no estate; secondly, that Joseph Westerman has an estate in fee in remainder, under the 13th clause; thirdly, that the trustees have the power of sale of the remainder in the other tenements not comprised in the 13th clause, after the death of John.

Certificate accordingly.

 Webb v. Hewlett.

WEBB v. HEWLETT.¹

Hilary Term, January 11, 1851.

Bankruptcy, Costs in — 12 & 13 Vict. c. 106, s. 85 — Costs of Action — Taxation.

A writ of summons having issued against the defendant, a summons in bankruptcy was afterwards taken out against him, returnable on the 17th, on which day an order was made by the commissioner, pursuant to the 12 & 13 Vict. c. 85, that the costs of the summons should abide the event of the action. On the 15th of October, a summons was taken out before a judge, returnable on the 17th, for staying proceedings on payment of the debt and costs, and an order for that purpose was made on the 18th. One bill having been taxed in bankruptcy, and the other in this court, the master added them together, and judgment was signed for the amount:—

Held, that the judgment was regular.

THIS was a rule calling upon the plaintiff to show cause why judgment and all subsequent proceedings should not be set aside for irregularity.

On the 1st of October, a writ of summons issued against the defendant. On the 9th, a summons in bankruptcy was taken out against him, returnable on the 14th, but could not be served. Proposals of settlement were then made, and the bankruptcy summons was renewed, returnable on the 17th. On the 15th of October, the defendant took out a summons before a judge to stay proceedings in the action, on payment of the debt and costs; but the judge not being at chambers, no order for that purpose was made until the 18th. On the 17th, an order in bankruptcy was made by Commissioner Evans, pursuant to the 12 & 13 Vict. c. 106, s. 85, that the costs of the summons in bankruptcy should abide the event of the suit. On the 19th of October, the plaintiff attended before the master and required him to tax the bill of costs in the action, and also the costs in bankruptcy. The master having refused to tax the latter bill, it was afterwards taxed in bankruptcy; whereupon, the master added it to the bill of costs in the action, and judgment was signed for the amount.

Lush showed cause. The plaintiff was entitled to sign judgment for both bills of costs. The question turns upon the construction of the 85th section of the 12 & 13 Vict. c. 106, the Bankrupt Law Consolidation Act. That section enacts, "That where any such trader, against whom an affidavit of debt is filed by any creditor as aforesaid, shall be summoned to appear before the court in which such affidavit shall be filed, every such creditor or trader shall have such costs as the court in its discretion shall think fit, or the court may direct the costs of either party of, incident to, or attendant upon, such affidavit and summons to abide the event of any action which shall have been brought or shall thereafter be brought for the recovery of such demand or any part thereof, and in such case such costs shall

¹ 20 Law J. Rep. (N. S.) Exch. 134.

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be costs in the cause, and recovered under the judgment and execution in such action."

[*Parke, B.* You have signed judgment on the taxation in the Court of Bankruptcy, and your argument is, that, under the new Bankruptcy Act, that taxation becomes the act of this court.]

Yes; it was not necessary for the plaintiff to obtain either an order of this court or of a judge, to add the costs in bankruptcy to the costs of the action.

Hawkins, in support of the rule. The judgment was irregular. If the judge had happened to attend at chambers on the 17th, then costs would not have been recoverable. The judge's order of the 18th only includes the costs incurred before the summons was taken out, and not those relating to the bankruptcy proceedings, the costs of which were not payable until after the return of the bankruptcy summons on the 17th. By the 85th section of the act, the costs are payable only when there is a termination of the action, which was not the case here, as the order of *Jervis, C. J.*, only stayed the action conditionally on payment of the debt and costs. Besides, the costs cannot be included in the judgment of this court, unless they are included in the master's allocatur. The master ought to have been asked to adjourn his taxation, to enable a taxation in bankruptcy to take place; instead of which he made his allocatur, which cannot now be reviewed without a judge's summons for that purpose.

POLLOCK, C. B. This rule must be discharged with costs. The proceedings were quite regular. The course which it is contended ought to have been pursued would have been an idle ceremony. The act of Parliament expressly provides for the present case. Here the two sums were added together by the master.

PARKE, ALDERSON, and MARTIN, BB., concurred.

Rule discharged with costs.

YOUNG & others, Assignees of ROBINSON, v. COOPER.¹

Hilary Vacation, February 14, 1851.

Pleading — Trover — Justification — Not Guilty — Conversion in Fact and wrongful Conversion.

The plea of not guilty in trover puts in issue not merely the conversion in fact, but the wrongful conversion. The case of *Standiffe v. Hardwick*, 2 Cr. M. & R. 1; s. c. 4 Law J. Rep. (N. S.) Exch. 161, is in that respect overruled.

To trover for furniture by the assignees of a bankrupt, the defendant justified the seizure under a judgment and execution against the goods of the bankrupt before his bankruptcy:—

Held, on demurrer, that the plea was bad, as amounting to not guilty.

¹ 20 Law J. Rep. (N. S.) Exch. 136.

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TROVER by the plaintiffs, as assignees of Robinson, a bankrupt, for furniture, &c.

Plea — That Robinson being indebted to the defendant, the latter recovered judgment and issued execution against him before his bankruptcy, under which execution the sheriff seized and sold the furniture, &c.; and that such seizure and sale were the conversion complained of.

Demurrer on the grounds that the plea was an argumentative denial of the causes of action, and amounted to the general issue; that it amounted to a denial of the conversion; that the plea was ambiguous; that if it sufficiently confessed a conversion, it did not and could not justify it, as every conversion was a wrongful act, and could not be justified; and that if it did not confess a wrongful conversion, it did not confess the cause of action.

Hugh Hill, in support of the demurrer. The plea is bad. It would have been clearly bad before the new rules. The law is thus stated in *Bac. Abr.* "Trover," F, 2: "The defendant in an action of trover cannot justify, because the conversion must be confessed by a plea of justification; but the conversion is the tortious act, therefore cannot be justified." "In trover, the defendant can plead nothing but *not guilty* or a release" — *Com. Dig.* "Action upon the Case upon Trover," G, 6. *Agar v. Lisle*, Hob. 187; *Ascue v. Sanderson*, Cro. Eliz. 433; and *Hartfort v. Jones*, 1 Ld. Raym. 393, support this view. The new rules of pleading, Hil. T. 4 Will. 4, do not alter the law in this respect. The court is now called on to determine whether the rule laid down in *Stancliffe v. Hardwicke*, that *not guilty* puts in issue a conversion in fact, and not merely a wrongful conversion, can be supported. It is submitted, that the view taken in that case was erroneous. Undoubtedly, that rule was recognized in *Vernon v. Shipton*, 2 Mee. & W. 9; s. c. 6 Law J. Rep. (N. S.) Exch. 25, and acted upon in *Weeding v. Aldrich*, 9 Ad. & E. 861; s. c. 8 Law J. Rep. (N. S.) Q. B. 119, although Littledale, J., as to this point, does not concur in the judgment of the rest of the court.

[*Parke, B.* In *Tripp v. Armitage*, 4 Mee. & W. 687; s. c. 8 Law J. Rep. (N. S.) Exch. 107, my brother Maule when at the bar convinced us that we were wrong in our decision of *Stancliffe v. Hardwicke*.]

In trover there could not be a good plea of leave and license. In *Whitmore v. Greene*, 13 Mee. & W. 107; s. c. 13 Law J. Rep. (N. S.) Exch. 311, *Parke, B.*, says, "We came to an erroneous conclusion in the case of *Stancliffe v. Hardwicke*, that the new rules have made any difference as to the meaning of a conversion." The same learned judge expresses himself in similar terms in *Kynaston v. Crouch*, 14 Ibid. 266; s. c. 14 Law J. Rep. (N. S.) Exch. 324. In *Mayheo v. Herrick*, 18 Law J. Rep. (N. S.) C. P. 179, *Coltman*, and *Williams, JJ.*, were of opinion that *Stancliffe v. Hardwicke* cannot be supported.

Crompton, in support of the plea. As the law now stands, it is

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unsafe in many cases for a defendant to rely on the plea of *not guilty* alone; and it is expedient that there should be one uniform rule on the point. There is as much ground for pleading the present plea as there is for pleading a justification to an action on the case for diverting a watercourse; and yet such a plea in the latter case is undoubtedly good.

[Parke, B. In an action on the case, the new pleading rules show that the plea of *not guilty* is to operate as a denial of the breach of duty or wrongful act only; that is, in the case of the diversion of a watercourse it denies the diversion only. Then, with respect to the action of trover, the meaning of the rule is explained afterwards; for it says, that in an action for converting the plaintiff's goods, *not guilty* puts in issue "the conversion only, and not the plaintiff's title to the goods." The question then is, whether that is a conversion in point of fact, or a wrongful conversion. In *Stancliffe v. Hardwicke*, we thought it meant a conversion in fact, but *ex vi termini* "conversion" means wrongful conversion.]

PARKE, B. I think the plaintiffs are entitled to judgment. We must abide by our amended view of the law with reference to the case of *Stancliffe v. Hardwicke*. The term "conversion" means wrongful conversion, and, therefore, our decision in that case as to this point was wrong. The general clause that "all matters in confession and avoidance" must be pleaded specially, applies to those subjects only that can properly be considered matters in confession and avoidance.

ALDERSON, PLATT, and MARTIN, BB., concurred.

Judgment for the plaintiffs.

IN THE EXCHEQUER CHAMBER.

DODGSON, public Officer, v. BELL.¹ 2

Michaelmas Term, November 30, 1850.

Company — Liability of Husband for Wife's Shares — Member of the Company under Stat. 7 Geo. 4, c. 46.

The defendant's wife, before marriage, was possessed of, and registered as the owner of, some shares in a joint-stock banking company. After her marriage, her maiden name remained on the list of shareholders; and she then, though without her husband's knowledge, received dividends and paid calls in respect of these shares. The defendant never did any act to take to himself the benefit of the shares, or to have them transferred into his own name, or to sell them; on the contrary, he refused to have any thing at all to do with them. The company's deed of settlement provided, that the husband of a female shareholder should not be a member of the company in respect of the shares of his wife vested in him by the marriage; but that he might either sell them, or, on complying with certain provisions of

¹ 20 Law J. Rep. (N. S.) Exch. 137.

² Coram PATTESON, COLERIDGE, WIGHTMAN, ERLE, TALFOURD, and WILLIAMS, JJ.

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the deed, have them transferred into his own name, and then become a member of the company:—

Held, that on a judgment recovered against the public officer of the company, a *sci. fa.* to levy execution under stat. 7 Geo. 4, c. 46, s. 13, can only issue against those who are members of the company according to the provisions of the deed of partnership; and that as the defendant had not complied with those provisions, he was not liable to a *sci. fa.* as a member of the company in respect of his interest in his wife's shares.

ERROR from the Court of Exchequer. The plaintiff, as one of the public officers of the Bank of Whitehaven, having recovered judgment for 13,477*l.* in an action of *assumpsit* against Walter Scott, one of the public officers of the Newcastle upon Tyne Joint-stock Banking Company, sued out a *sci. fa.* against the defendant, averring the defendant to be a member of the last-mentioned company, with the view of obtaining execution against him. The defendant pleaded "that he was not, at the time of the issuing the said writ of *sci. fa.*, a member of the said copartnership called the Newcastle upon Tyne Joint-stock Banking Company, in manner and form as in the said writ of *sci. fa.* and declaration alleged."

The issue raised on this plea was tried, before Patteson, J., at Newcastle upon Tyne on the 30th of July, 1849. The following facts were taken upon admissions, and set out in the bill of exceptions tendered to the ruling of the learned judge:—

The defendant, on the 23d of September, 1843, married Mary Stephenson, who, in A. D. 1839, had become, and at the time of her marriage continued to be, a shareholder in the Newcastle upon Tyne Joint-stock Banking Company in respect of twenty original shares, which were allotted to her by the directors of the company on her application. She received the dividends up to 1846, and in respect of her shares paid calls before her marriage and one call after her marriage. She never executed the after-mentioned deed, nor any deed of accession thereto, nor was ever required to do so. The calls were paid in her maiden name, and her maiden name remained on the list of shareholders. The name of the defendant never appeared in the books of the bank or on the list of shareholders. The defendant knew that his wife was a shareholder in the bank when he married her, but he was not aware of her paying the calls or receiving the dividends.

The company's deed of settlement was put in evidence. It was dated the 2d of July, 1836.

By a preliminary interpretation clause in the deed, it was provided that "the expressions 'shareholders' and 'members' shall respectively mean the owners for the time being of shares in the capital of the said company."

By clause 13¹ the shares as between the shareholders were to be personal estate, but they were not to survive.

¹ The more material clauses were as follows:—

27. "That before the assignees of a bankrupt or insolvent shareholder, or the executor, administrator or legatee of a deceased shareholder, or the husband of any female shareholder, shall sell, transfer, or assign any shares vested in him in any such capacity, or shall become a member of the company in respect of such shares, or receive

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It was further proved that the defendant had never done any of the acts required by the 29th clause, and that in answer to an application to him by the solicitor of the company touching a call upon the shares in question, he replied that he would have nothing to do with it, and would not interfere at all. Neither the defendant nor his wife

any dividend in respect of the same, he shall leave for inspection, at the banking-house of the company in Newcastle upon Tyne, the assignment, probate, or the letters of administration under which, or the certificate of the marriage with the person in whose right he shall claim to be entitled to such shares, or shall otherwise prove his title thereto to the satisfaction of the directors."

28. "That the husband of any female shareholder, or the executor, administrator, or legatee, of any deceased shareholder, or the assignee of any bankrupt or insolvent shareholder, shall not be a member of the company in respect of the shares vested in him in any of the capacities; but such assignee, husband, executor, administrator, or legatee, may either dispose of the shares so vested in him, or at his option become a member of the company in respect of such shares on complying with the provision next hereinafter expressed."

29. "That the husband of any shareholder, or the executor, administrator, or legatee of a shareholder, who shall be desirous of becoming a member of the company in respect of the shares which may so become vested in him, shall give notice in writing at the banking-house of the company in Newcastle upon Tyne, of such his desire, in which notice shall be expressed the name and place of abode of the person giving the same, and the name of the shareholder in whose right he claims, and the number of shares in respect whereof he is desirous of becoming a member; whereupon and upon otherwise complying with the provision of the deed of settlement, he shall be admitted a member of the company in respect of such shares, and have the same transferred into his own name, and shall be personally charged with the duties and liabilities incident to the ownership thereof."

30. "That the husband or the executor, administrator, or legatee of any shareholder who shall not so elect to become a member of the company, and also the assignee of every bankrupt or insolvent shareholder, shall be entitled to receive any dividend which shall have become due on the shares so vested in him before his title thereto accrued, but not to any dividends which shall become due on the same shares after his title shall have accrued, but till some person shall have become a member of the company in respect of the same shares, such dividends shall remain suspended, and shall not be paid till the transfer of the shares, in respect of which such dividends became due shall be completed; and the new holder thereof may claim the same; and every transfer shall carry with it the profits and dividends of the share of the capital and of the guaranty fund in respect of the shares so transferred so as to bar the right and interest of the party making such transfer in respect of such transferred shares."

31. "That in case any person in whom any shares shall by original subscription, or by purchase, bequest, marriage, representation or other mode of acquisition or devolution become vested, and who shall not have executed the deed of settlement, shall, for six calendar months after notice in writing given to him for that purpose, neglect or refuse to execute the same, the directors may declare the shares so vested in the person so neglecting or refusing, and all benefit thereof, to be forfeited to the other shareholders, and the same shall be forfeited accordingly."

32. "That every person to whom shares shall be transferred, and who shall not then be a member of the company in respect of any other shares, and every person who being the husband of any shareholder, or the executor, administrator or legatee of any shareholder, shall, by notice in writing as aforesaid, signify his desire to become a member of the company in respect of the shares vested in him in such capacity, and shall not at the time of the said shares becoming vested in him be a member of the company in respect of any other shares, shall, as to all duties, obligations, claims and demands upon or against him in respect of such shares, be considered a member of the company from the time of the same shares being so transferred to or so becoming vested in him, but as to all profits and rights, privileges and benefits to arise from the same shares, such person shall not be considered as a member until he shall have executed the deed of settlement or some deed of accession thereto."

ever made any assignment or transfer of these shares. The learned judge directed the jury that the defendant was entitled to a verdict, and the jury accordingly found for the defendant.

The case was argued by

Unthank, for the plaintiff in error. This case is brought before the court with a view of having the decisions in *Ness v. Angas*, 3 Exch. Rep. 805; s. c. 18 Law J. Rep. (N. S.) Exch. 470, and *Ness v. Armstrong*, 4 Ibid. 21; s. c. 18 Law J. Rep. (N. S.) Exch. 473, reconsidered. It is submitted that those decisions are wrong, that the present defendant was liable as a member of the company, and that he became a member of the company on his marriage, as by law the right to his wife's shares vested in him at that time. The case of *Steward v. Greaves*, 10 Mee. & W. 711; s. c. 12 Law J. Rep. (N. S.) Exch. 109, was not noticed by the Court of Exchequer in the above-mentioned decisions. The question turns upon the effect of the stat. 7 Geo. 4, c. 46. It is submitted that the statute imposes a liability on those who would be members of the partnership at common law, and not, as is said in *Ness v. Angas*, on those only who are members *inter se* strictly according to the provisions of the deed of partnership. The word "member" used in the statute, it is submitted, means "partner," according to the common law sense of the word. Great openings for fraud would be made if the word "member" in the statute were to be construed by the terms of the particular deed of partnership. The deed says those only shall be members whose names are on the register of shareholders. Under such a provision, a party of rich men might form a company, and putting on the register only the name of some persons without means, might themselves reap all the profits, and at the same time escape from all liability. If the women only were shareholders, and they all married, their husbands must receive all the benefits, and, according to this construction, incur no risk. In this case, the defendant was entitled to all the profits of the shares *jure mariti*. It is true that the statute imposes on the members of a copartnership different liabilities from those of the common law; but that is according to an equitable arrangement; it relieves some members from a liability, and imposes it on others. The statute should be construed liberally for the benefit of creditors. It is not often in the case of a joint-stock company that the question as to the liability of a person from holding himself out as a partner can arise, and the facts do not raise it here. But there is no reason why, if a party hold himself out as a member at the time of making the contract on which the company was sued, he should not be made liable as a member; though probably the statute would not affect him if he only held himself out as a member at the time of judgment recovered or at the time of execution. The deed here does not say that the defendant is not a member, nor is there any clause that prevents the transfer to him by operation of law on his marriage. On the contrary, it treats the shares as his, sects. 27, 28, 29, and 30. It admits that they vest in him. It gives him a power of being put upon the register of shareholders, or if he does

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not choose to be placed on the register, of transferring the shares. The profits only are suspended until the one course or the other be adopted.

[*Erle, J.* Marriage, death, or bankruptcy generally dissolve partnership. Do you say that by marriage, death, or bankruptcy of a shareholder, the husband, executor, or assignee respectively will become a partner against his will?]

It is submitted that he will. An executor might plead that the shares are worthless, and that he has no assets. A husband might assign his shares over, and so rid himself of all liability. There are various cases under the Winding-up Act which show that a husband is so interested in his wife's shares in a joint-stock banking company that he must be considered as a member of it, and as such, in case the company fail, be subjected to have his name inserted in the list of contributories to satisfy the liabilities of the company. *Ex parte Kluht*, 19 Law J. Rep. (N. S.) Chanc. 385. *Burlinson's Case*, 18 *Ibid.* 250. *Sadler's Case*, *Ibid.* 251. In like manner an executor has been made a contributory. *Ex parte Gouthwaite*, 19 *Ibid.* 393.

Knowles and *Hugh Hill*, for the defendant in error, were not called upon.

PATTESON, J., delivered the judgment of the court. In this case judgment has been recovered for a large sum against the public officer of the Newcastle upon Tyne Joint-stock Banking Company, and upon that judgment a *sci. fa.* has been sued out to fix the defendant as a member of the company for the time being, under the provisions of the stat. 6 Geo. 4, c. 46, s. 13. At the trial, the facts of the case were all taken upon admissions which were made for the purpose of raising the question, and of reviewing the decisions of the Court of Exchequer in the cases of *Ness v. Angus* and *Ness v. Armstrong*, upon which decisions at the time I was requested to act. The facts proved were, that the defendant's wife was a member of the company originally, but it seems that she never executed any deed. Probably that is not very material. It is stated that the defendant when he married her was aware that she had some shares, but he never took any step to have them transferred into his own name; and they always remained in his wife's maiden name. She paid calls and received dividends after her marriage in her maiden name. It is found, that the defendant was not aware of that. It is further found that, on an application for a call being made to him, he said that he would have nothing to do with it. He therefore has done no act by which he has taken to himself the benefit of these shares. So far, indeed, the case differs considerably from the case of *Ness v. Angus*, for in that case the shares were bought after the marriage, and the husband had received the dividends repeatedly. The question is, whether the defendant was shown to be a member of the company for the time being. It is said that the shares would vest in the husband by the marital right, that on the marriage, by the common law he would become a shareholder, and that there is nothing in the deed

to prevent the shares vesting. It may be perfectly true that the shares would at common law vest in the husband; but that vesting must always be subject to the provisions of the deed by which the original partnership was constituted, so far as they are consistent with the law of the land. It is said, in sect. 12 of the deed, that the persons in whose names the shares shall stand shall be deemed the owners. The person in whose name these shares stood was the wife. Perhaps, however, that circumstance would not be at all conclusive. But sects. 27 to 32 inclusive of the deed go on to show what is to be done in case of any transfer by operation of law. If any words can be clear the words are clear here, that the mere vesting by operation of law shall not make the person in whom they are so vested a member of the company until he has done certain things. The word "vested," used in the deed, is pressed upon us in order to found an argument that the deed itself acknowledged that the right to the shares vested at common law in the husband. It recognizes his right, indeed, but says that he must do certain acts to complete that right before he can become a member. An option is given to him either to sell the shares or to become a member. Sect. 28 says, the husband of any female shareholder shall not be a member of the company in respect of the shares vested in him, but that he may either become a member or may sell the shares. If these words have any meaning at all, they show that so far as regards the members of the company *inter se*, the husband does not become a member unless he takes some further steps. Then sect. 29 shows what the steps are which he is to take when he desires to become a member. He is to give notice of his desire and to comply with the provisions of the deed, and thereupon he will be admitted a member and have the shares transferred to him, and then he is to be liable to be personally charged with debts and liabilities incident to the ownership thereof. If he does not elect to become a member, the dividends, by sect. 30, are to be suspended till some person becomes a member of the company in respect of the shares. Then comes a provision, sect. 31, that if any party in whom any share shall have been vested shall for six months neglect or refuse to execute the deed of settlement, the directors may declare the shares to be forfeited. Can any provisions be more distinct than these, so far as the company are concerned? They distinctly provide that where a man marries a woman that is a shareholder, he shall not be entitled to any profits at all until he comes in and executes the deed, and that if he do not choose to do so, or transfer them to any one else, the shares may be forfeited. It is clear, therefore, that the defendant never having done any act, or expressed any wish to become a member, is not a member of such company, so far as the company is concerned. Then, is he a member as regards other persons? There are no facts here to raise the question, whether the stat. 6 Geo. 4, c. 46, applies to a person who has held himself out as a member of the company. In the case of *Ness v. Angas, Rolfe, B.*, explained how a man who has held himself out as a partner is made liable; that the holding himself out does not make him a partner, but that as to the person to whom

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he has held himself out as a partner, he is prevented from turning round and saying that he is not a partner. We are all of opinion that under this act of Parliament the creditor must show that the person whom he seeks to make liable is actually a member of the company, and that he is not a member of the company, and consequently not liable under the *sci. fa.*, until he has complied with the terms of the deed of partnership. The decisions in the Court of Chancery under the Winding-up Act, which have been referred to, have not much bearing on the present case. In one or two of them it appears that the wife had covenanted to do certain things, and it was said that the husband was liable for the wife's covenant. We are all of opinion that as the facts of this case show that the defendant never was a member of this company at all, the verdict was right, and that the judgment must be affirmed.

Judgment affirmed.

STORY v. FINNIS & another.¹

Hilary Term, January 29, 1851.

Payment of Money into Court — Effect of, in tort.

Payment into court in *tort* has the same effect as payment into court in actions of *indebitatus assumpsit*, namely, that of admitting a cause of action, with damages, amounting to the sum paid into court.

CASE. The first count, which was for pound breach, stated that one Jones was tenant to the plaintiff of certain premises, that rent to the amount of 58*l.* was in arrear, that the plaintiff took certain goods upon the premises as a distress and impounded the same, and that the defendants broke the pound and rescued the goods. The second count, which was for a rescue, stated that whilst the plaintiff, who had seized the said goods as a distress, was removing them for the purpose of sale, the defendants rescued them.

Plea, payment of 21*l.* into court, as treble damages, and that the plaintiff had not sustained more damages than 7*l.*

Replication, that the plaintiff had sustained greater damage than 7*l.*

At the trial, before Pollock, C. B., at the sittings after Hilary term, 1850, the facts appear to be these: A person named Towne was the tenant to the plaintiff of a sugar-baker's factory, in Bethnal Green, of which one Challoner was the ground landlord. The rent being in arrear, the plaintiff distrained upon Towne, on the 1st of May; and on the 4th of May, the ground landlord, Challoner, distrained upon the same premises in respect of rent due to him from the plaintiff. On the 7th of May, the officers of the defendants, who were the sheriffs of London, seized the goods in question under a *fi. fa.* against the goods of the plaintiff. Much contradictory evidence was given

¹ 20 Law J. Rep. (n. s.) Exch. 144.

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as to what took place during the time that the several bailiffs were in possession of the premises, and as to the share that Willis the sheriff's officer took in the transaction. It appeared, however, that the sheriff's officer refused to allow the goods to be taken away from the premises, and had ordered them to be brought back to their proper place. The goods were accordingly brought back, and were ultimately applied in satisfaction of the claim of the ground landlord. The jury, under the above circumstances, found a verdict for the defendants.

A rule for a new trial was afterwards obtained, against which

Bramwell and *Burchell* showed cause January 13. It will be contended, on the other side, that payment of 21*l.* into court admits that the defendants were guilty of a rescue, and therefore that the plaintiff is entitled to at least nominal damages on the second count. But that is not so. Payment into court in the present action resembles payment into court on the *indebitatus* counts. The defendants admit that a rescue has taken place, but not the particular one charged in the declaration. That rescue is to be proved and identified by the plaintiff. They then contended that the pound broken was the pound of Challoner, the ground landlord, and not of the plaintiff, and that the sheriffs were not concerned in the breaking or the rescuing, citing *Earl Spencer v. Swannell*, 3 Mee. & W. 154; s. c. 7 Law J. Rep. (N. S.) Exch. 73.

Watson and *C. Lewis*, in support of the rule. Payment into court amounts to an admission of the particular rescue stated in the declaration.

[*Alderson*, B. There is no admission of any particular rescue. It is like the case of *indebitatus assumpsit*, in which by payment into court you merely admit something to be due.

Pollock, C. B. There is a difference between a special contract and a case of *tort*. By payment into court in the former case, the contract is admitted. But although by payment of money into court in cases of *tort* you admit some injury, yet you do not admit the specific injury complained of; that must be proved by evidence.

Parke, B. A judgment by default admits that the plaintiff is entitled to recover nominal damages only. This is like a case of judgment by default, with a challenge to the plaintiff to prove that damage to a greater extent than 7*l.* has been incurred. But here the plaintiff has not proved he has sustained more than nominal damages.]

Lloyd v. Walkey, 9 Car. & P. 771, is in point.

[*Pollock*, C. B. The case of *Cook v. Hartle*, 8 Ibid. 568, is applicable to this case. That was trover for various articles, and money was paid into court. It was held, that the plaintiff was bound to show what articles the defendant had converted, and that the declaration in trover being general, the defendant by his plea did not admit any thing beyond the amount of his payment into court.]

They cited *Speck v. Phillips*, 5 Mee & W. 279; s. c. 8 Law J. Rep. (N. S.) Exch. 249, and *Wright v. Goddard*, 8 Ad. & E. 144; s. c. 7 Law J. Rep. (N. S.) Q. B. 174.

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POLLOCK, C. B., now said: In this case we are all of opinion that the rule ought to be discharged. The point chiefly made on the argument was, that the payment of money into court was an admission of the plaintiff's right of action; that it conclusively admitted the pound breach and rescue by the defendants or their officers; and that, therefore, it was a mere question at the trial, before me, what was the amount of damage. We are all clearly of opinion that the payment of money into court in the case of a wrong is similar to the payment of money into court in the case of a special contract. It has long ago been settled over and over again, that the payment of money into court on a general *indebitatus assumpsit* really admits nothing but that there is a cause of action with damage amounting to that which was paid into court, and we think the same principle applies to the case of a wrong. This opinion was, during the course of the argument, thrown out by almost every member of the court; and we are all of opinion that is the true result of the payment of money into court in an action for a wrong. But it was suggested and contended further, (although the principal ground of argument was, undoubtedly, that which we have just stated and disposed of,) that there was evidence to go to the jury that Willis, the officer of the sheriff, had been guilty of pound breach or rescue, the result of which would be a damage greater than that paid into court; and it was contended that the fault was that of the sheriff. Now, without at all entering into the question of whether the sheriff would be liable, (as to which there is a very strong opinion, I believe, in the majority of the court, that he would be liable even in this case,) on looking over the notes we are all of opinion there is no evidence that would have justified a verdict against the sheriff, on the ground that Willis had been guilty of either a rescue or a pound breach; for, in reality, the only evidence given on the part of the plaintiff was, that Willis had not allowed the goods to go, but he had ordered them back; and the evidence on the part of the defendant was, that they had not removed them at all, that the goods had remained. We are, therefore, of opinion that this rule must be discharged.

*Rule discharged.*COLLEDGE v. HARTY.¹

Hilary Term, January 21, 1851.

Insurance — Sea Policy — Warranty — Exception.

A marine policy was made subject to certain rules, one of which was that ships were not to sail from any of the ports following, between the times set opposite thereto, that is to say, from any port on the east coast of Great Britain between the 5th of October and the 5th of April to any port in the belts between the 20th of December and the 15th of February. The plaintiff's vessel sailed, on the 8th of February, for F., a port in the Belts, and was lost:—

¹ 20 Law J. Rep. (N. S.) Exch. 146.

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Held, in an action by the assured against the insurer, that the rule amounted to a warranty, and not to an exception, and that the plaintiff was not entitled to recover in respect of the loss:—

Held, also, that the word "to," as used in this rule, meant "towards."

ASSUMPSIT on a club policy of insurance, by the assured against the insurer, to recover certain sums in respect of the loss of the ship *Benoni*. The declaration stated the policy to be made subject to certain rules, and that by one of those rules ships were not to sail *to and from* any of the ports or places following between the times set opposite thereto, that is to say, to any port or place in the Baltic beyond Copenhagen, and below the gulfs before named, or any port or place in the Belts, between the 20th of December and the 15th of February. The declaration then alleged that the ship was lost by perils of the sea, and that she did not sail to any port or place in the Baltic beyond Copenhagen and below the gulfs, or any port or place in the Belts, between the 20th of December and the 15th of February aforesaid. Breach, non-payment of the sums demanded.

Seventh plea, that after making the policy and after the said rules had been subjoined, and during the continuance of the policy and of the insurance, and whilst the same endured, the ship sailed from Newcastle upon Tyne to a port in the Belts called Flensburg, between the 20th of December and the 15th of February. The eighth plea was similar in its terms, and stated that the ship sailed to a port in the Baltic, beyond Copenhagen and below the gulfs aforesaid, called Flensburg, between the 20th of December and the 15th of February. Issues were joined on these pleas.

At the trial, before Pollock, C. B., at the Middlesex sittings, after Trinity term last, the following facts appeared: The plaintiff had effected an insurance on his vessel, the *Benoni*, with an association called "The Monkwearmouth Sea Insurance Association," of which the defendant was a member, and the action was brought by the plaintiff to recover from the defendant certain sums in respect of the loss of the plaintiff's ship, which had been lost by the perils of the sea. The policy was made subject to certain rules. The 9th rule was in these terms: "Ships not to sail to and from any of the ports or places following, between the times set opposite thereto, that is to say." Various places were then enumerated, from which within certain specified times no voyages were to be made. The rule then proceeded in these terms: "From any port on the east coast of Great Britain between the 5th of October and the 5th of April to any port or place in the Baltic, beyond Copenhagen and below the gulfs before named, (Bothnia, Finland, and Livonia,) or any port or place in the Belts, between the 20th of December and the 15th of February." On the 8th of February, 1849, the plaintiff sailed from Newcastle upon Tyne for Flensburg, in the Belts, which is a port in the Baltic, beyond Copenhagen, and in the Belts. The ship was lost in the Baltic.

Under these circumstances, the learned chief baron was of opinion that the plaintiff had been guilty of a breach of warranty contained in the rules, and that the defendant was entitled to a verdict on the

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seventh and eighth pleas; but he gave the plaintiff leave to move to enter a verdict for him on those pleas, if the court should think that the sailing by the plaintiff on the 8th of February did not amount to an avoidance of the policy.

A rule having been obtained accordingly, or for judgment *non obstante veredicto*,—

Watson, Willes, and D. Seymour showed cause. The defendant is entitled to retain the verdict. The 9th rule amounts to a warranty, for it contains a prohibition to ships to sail within certain specified periods. No express words are necessary to constitute a warranty. *Arnould on Insurance*, 578. The object of the rule was, that the ship in question should not be exposed to the dangers attendant upon the sailing within the prohibited periods. The meaning of the 9th rule is, not that the vessel is not to arrive at a port within the period in question, but that she is not to set sail on her voyage within that time. The important point is the time of starting, not the time of arriving.

[*Pollock, C. B.* The rule must refer to the departing from a place.]

"To" means "towards." The ship is not to be on her voyage before the 15th of February. They cited *Pittegrew v. Pringle*, 3 B. & Ad. 514. *Graham v. Barras*, 5 Ibid. 1011; s. c. 3 Nev. & M. 125. *Moir v. The Royal Exchange Assurance Company*, 6 Taunt. 241.

Unthank, in support of the rule. The 9th rule is an exception, and not a warranty. The word "to" means arriving at a particular place, as the word "from" means leaving a particular port. The object was to prevent the ship from being in the Cattegat or Baltic at a dangerous season of the year. If the argument of the defendant were to prevail, the objects proposed by this rule would in many cases be defeated. A vessel might, for instance, start from a western port of Great Britain just before the 20th of December, and thus get into the midsts of the dangerous and prohibited period. Secondly, this is the case of an exception, and not of a warranty; and as the plea does not state that the vessel was lost during the prohibited voyage, the plaintiff is entitled to judgment *non obstante veredicto*.

POLLOCK, C. B. I think this rule must be discharged. The question is, whether the plaintiff's vessel was entitled to sail from the east coast of Great Britain to Flensburg, beyond Copenhagen, between the 20th of December and the 15th of February, and yet be entitled to the benefit of the policy. That turns upon the meaning of the word "to" in the rules; whether it means that the vessel is not to arrive at her place of destination within the limited period, or whether it means that she is not to set sail within that period. On the part of the plaintiff, it is argued, that it cannot bear the former of these significations, because such a construction would involve many anomalies; and without doubt it is difficult to construe the rule in a manner that is quite satisfactory. But, on looking at the entire rule, I think we ought to construe "to" as meaning "towards." That is

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the sense in which the word is used in a policy of assurance and in a bill of lading, and the fact of that construction leading us to many anomalies ought not to make us put a different interpretation upon the word. The argument of the plaintiff's counsel leads to this conclusion, that until the end of the voyage it would be uncertain whether the ship was protected or not. Such being our construction, it is plain that the assured cannot recover. The other part of the rule as to judgment *non obstante veredicto* depends upon whether the stipulation in question is a warranty or an exception. The question, however, is not very material, for if it be an exception, an application might be made to the court to put the proceedings in such a shape as to give the defendant the defence he intended to set up. I think, however, that this was the case of a warranty, and not an exception.

PARKE, B. I am of the same opinion. The first point turns upon the meaning of the words "from and to," or, rather, upon the meaning of the word "to." The word in its natural meaning signifies "towards;" and much absurdity would result in construing it to signify "at." The 9th rule states that the vessels are not to start from any port on the east coast of Great Britain between the 5th of October and the 5th of April, to any place below the Gulfs of Bothnia, Finland, and Livonia, between the 20th of December and the 15th of February. Now if, according to the plaintiff's construction of the rule, the vessel is not to arrive at those places within a limited time, why make any distinction as to the ports from which the vessel is to start? There is certainly some obscurity in the provisions contained in the rules; but I think we have put the proper construction upon them, and that the ship is not protected by the policy. The next point is, whether this is the case of an exception, or a warranty; and if it be an exception, is the plea bad in omitting to aver that the ship was lost during a prohibited voyage? I think it must be construed as a warranty, and not as an exception. The rules contain certain cases of exceptions. The 8th rule, which relates to beaching risk, the rule which relates to boats being over the stern of the vessel, and the 28th rule, present instances of exceptions. The 9th rule is a warranty and not an exception, for no definite time is mentioned within which the vessel can be upon the policy again.

ALDERSON, B. The meaning of the words "to and from" is quite clear. The vessel is not to sail towards a particular place during a certain period. Many absurdities would follow if we were to put a different construction upon the words. Then, as to the second point, I think this is a warranty and not an exception. The 8th rule provides that a vessel beaching before or after a specified time is not entitled to recover for any loss during a subsequent voyage until surveyed and reported sufficient. That is an exception as to the damage taking place between the beaching and the survey. But with regard to the 9th rule, there is no such period of probation.

Rule discharged.

Doe d. Jones v. Hughes.

DOE d. JONES v. HUGHES.¹

Hilary Vacation, February 14, 1851.

Will — Charge of Debts — Estate of Executor.

E. H., by will, after charging all his real and personal estate with the payment of his debts, funeral and testamentary expenses, and of a certain legacy, gave and devised the rents and profits of all his messuages, tenements, farms and lands, except his Bala houses, to A. H., his wife; and by the same will he gave her the whole of his personal estate, and appointed her sole executrix: —

Held, that the Bala houses passed to the heir at law of E. H., subject in equity to the charge of debts, and that A. H. had no power to dispose of them for the purpose of paying the debts.

EJECTMENT for certain houses at Bala, in Merionethshire.

At the trial of the cause, at the Merionethshire Summer assizes, 1850, before Talfourd, J., the lessor of the plaintiff was proved to be entitled to the premises in question as devisee of the heir at law of Evan Hughes, the person last seized. The defendant put in the following will of Evan Hughes: "I subject and make liable all my real and personal estate with the payment of my just debts, funeral and testamentary expenses and charges attendant thereon, and the legacy hereinafter by me bequeathed; and subject thereto and to the payments thereof, I give and devise the rents and profits of all and singular my messuages, tenements, farms, and land, (except my Bala houses,) situate in the parish of Llanfyllin and Llanycil, unto my dear wife Ann Hughes for and during the term of her natural life, and that my said wife has a power to charge one half of the value of Llanfyllin property, and to be at her own disposal; and after her decease I give and devise my messuages called Brynmoel, Brynda and Erwbock, unto my relation Hugh Hughes, his heirs and assigns forever. I give and devise after my wife's decease all and singular other the farms, tenements, messuages, and lands situate in the several parishes of Llanycil and Llanfyllin unto my friends and relations, Robert Jones and Cadwalader Jones, their heirs and assigns forever. I give and bequeath unto my friend Edward Rowlands 5*l*. for making this my will. And as touching and concerning the rest, residue and remainder of all and singular my personal estate, ready money, plate, china, linen, and furniture of what nature or kind soever and wheresoever, although not herein specifically named and particularized, I give and bequeath the same unto my said dear wife, Ann Hughes, to be at her own disposal; and I do hereby appoint her the sole executrix of this my last will and testament." Signed, &c.

The testator died greatly indebted, and the defendant, his executrix, supposing that the charge of debts gave her power to appoint, had appointed the Bala houses to one John Jones, for the purpose of raising money to pay the debts of the testator. The action was defended by the defendant in order to protect John Jones. The

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learned judge directed a verdict for the lessor of the plaintiff, with leave to the defendant to move to enter the verdict for her.

A rule to show cause had accordingly been obtained in Hilary term last, by *E. Beavan*, against which

Welsby and *E. V. Richards* showed cause.¹ The will only charges the property with the payment of debts, which is to be enforced in equity, and no legal estate is created.

[*Alderson*, B. Suppose the houses had been expressly devised to another person, could the executrix have sold them?]

The present case is substantially the same, for the heir is in by descent, unless there be an express devise to the executrix for sale. The cases in which a power of sale has been held to exist without an express devise are all cases in which an intention was manifested by the terms of the will, that the executors should apply the proceeds of the property in the execution of their office, and so a power to sell has been implied. *Anonymous*, 3 Dyer, 371, b. *Tylden v. Hyde*, 2 Sim. & S. 238. Vin. Abr. "Devise," 2. c. pl. 1. In Sugden on Powers, vol. 1, p. 138, it is laid down, that a power in a will to sell or mortgage, without naming a donee, will, if a contrary intention do not appear, vest in the executor, if that fund is to be distributable by him either for payment of debts or legacies. And this is the principle which is deducible from numerous decisions. *Patton v. Randall*, 1 Jac. & W. 189. *Bentham v. Wiltshire*, 4 Madd. 44. *Elton v. Harrison*, 2 Swanst. 276, n. *Gosling v. Carter*, 1 Coll. C. C. 644; s. c. 14 Law J. Rep. (n. s.) Chanc. 218. *Forbes v. Peacock* 11 Mee. & W. 630; s. c. 12 Law J. Rep. (n. s.) Exch. 460. The courts have always endeavored to construe a will as charging the real property with the payment of debts, in consequence of the state of the law prior to 3 & 4 Will. 4, c. 104; but the decisions upon this point do not give any power of sale to executors, but only establish that the estate passes to the devisee or heir, as in this case, subject to the charge, and becomes assets in his hands. Although without a charge of debts, the real property is, since 3 & 4 Will. 4, c. 104, applicable to the testator's debts, the order of application and the rights of the creditors are materially affected by a charge. See Williams on Executors, vol. 1, p. 511, last edit.; Jarman on Wills, vol. 2, p. 546.

Tomlinson, *E. Beavan*, and *Morgan Lloyd*, in support of the rule. It is submitted on behalf of the defendant, first, that a charge of debts is equivalent to a direction to sell such property as may be necessary for the payment; secondly, that where there is no express devise or trust commensurate with the object of raising the debts, the power to sell is lodged in the executor; and thirdly, that the purchaser is not bound to see to the application of the purchase money, or to inquire whether there is other property previously applicable.

¹ February 12 and 13, before PARKE, ALDERSON, PLATT, and MARTIN, BB.

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[*Parke, B.* The material question is, whether a mere charge is equivalent to a direction to sell.]

To establish this, it will be necessary to consider a series of decisions. Prior to the 3 & 4 Will. 4, c. 104, real property was not applicable to the payment of debts generally, and the terms of that enactment seem to imply that a charge of debts would give such power. It provides that real estates not charged with, or devised subject to, the payment of debts, shall be assets to be administered in courts of equity. So that, if the realty was by will subjected to the payment of debts, it would not necessarily be administered in a court of equity.

[*Parke, B.* The statute does not give a charge upon the estate, but only makes it assets.]

In the case referred to in *Dyer*, also reported in Sav. 72, the testator had devised all his property to his sister, excepting out of the general grant his manor of R., which he appointed to pay his debts, and the court held, that the executors took the manor of R. because it was the testator's intention that his debts should be paid, and either a sale or mortgage would be the simple and speedy mode of doing it. In *Tylden v. Hyde*, the court implied a power to sell in the executors.

[*Parke, B.* In that case there was a clear intention that some one should sell.]

In *Elliot v. Merriman*, Barnar. 78, which is cited in many subsequent cases as authority for the position, that a charge of debts is equivalent to a trust to sell, the very inconvenience which in this case the executrix endeavored to avoid is pointed out. The master of the rolls there says, "If the distinction between a direction to sell and a charge were made, the consequence would be, that whenever lands are charged with the payment of debts generally they would never be discharged of the trust without a suit in this court, which would be highly inconvenient." The same point is assumed in *Ball v. Harris*, 4 Myl. & Cr. 264; s. c. 8 Law J. Rep. (n. s.) Chanc. 114, and supported by *Shaw v. Borrer*, 1 Keen, 559; s. c. 5 Law J. Rep. (n. s.) Chanc. 364.

[*Parke, B.* That case will not warrant you in saying that the executors could have sold without the consent of the trustees.]

Bailey v. Ekins, 7 Ves. 319; *Dolton v. Hewen*, 6 Madd. 9; *Williams v. Chitty*, 3 Ves. 552; *Newman v. Johnson*, 1 Vern. 45; *Blaggrave v. Blaggrave*, 4 Exch. Rep. 550; s. c. 19 Law J. Rep. (n. s.) Exch. 414, are to the same effect. The last case is *Forbes v. Peacock*, 11 Sim. 152; s. c. 9 Law J. Rep. (n. s.) Chanc. 367; 12 Sim. 528; s. c. 13 Law J. Rep. (n. s.) Chanc. 46; and on appeal, 1 Ph. 717; s. c. 15 Law J. Rep. (n. s.) Chanc. 371. The reversal, on appeal, of the judgment of the vice chancellor did not touch the main question, as to the power of the executor to sell. It is also contended that an implied direction to sell is equivalent to an express direction, and this will contains such implied direction. The testator's intention that these houses should be sold is manifested. He begins by subjecting his real and personal estate to the payment of his debts, funeral and

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testamentary expenses and legacy. He then devises all his lands, &c., *except the houses in question*, thereby impliedly appointing those houses for the payment of his debts; for the exception of the houses shows that he had them in his view and intentionally included them in the charge of debts. His afterwards excepting them in the devise to his wife showed he wished her to sell the houses in preference to the other freehold estate. Then, again, the testator charges his freehold estate not only with debts, but also with *funeral and testamentary expenses and legacy*. These were to be paid immediately after his death, and that by the executrix. If he intended that she should pay his funeral and testamentary expenses out of the estate, he must have intended that she should have power to sell for that purpose. The natural construction of the will, therefore, is, that the testator *intended* these houses to be sold, and if that was his intention to be gathered from the will, it amounts to an implied direction to sell. It therefore comes within the doctrine laid down in the case of *Forbes v. Peacock*, and according to that authority the executrix had a power to sell or mortgage, which was properly exercised.

Cur. adv. vult.

Judgment was now delivered by

PARKE, B. [After stating the will, his lordship said:] There is no doubt the Bala houses, not being devised by the will to any devisee, passed to the heir at law. Whether there was a remainder in the Bala houses after the death of his wife Ann Hughes, is a matter hardly necessary to determine, although it appears pretty clear that there was not; so that the Bala houses pass in fee to the lessor of the plaintiff; and the question is, whether the executrix of this will, who appears to have been in want of money for the purpose of paying the debts and funeral and testamentary expenses, had power to sell or mortgage the Bala houses for the purpose of raising that money. She took advice upon the subject, and in order to save the expense of an equity suit, the property being very small, she took upon herself to mortgage this property to a third person who advanced the money. The question is, whether under the will she had any title to do so. Now, yesterday all the cases upon this subject were brought before us, and it was contended, on behalf of the defendant, that the effect of a charge of the real estates with debts was to give the executrix an implied power of sale; but on looking through those cases and considering them, it is perfectly clear there is no one case that goes to the extent of that proposition. There is a class of cases which show that if the real estate were devised to trustees charged with the debts of the testator, those charges impose on the trustees the trust of raising money to pay those debts; the estate being given to them, they can through the means of the estate raise money for the payment of those debts.

There is another class of cases which decide, that if it appear from the whole purview of the will that the testator means his real estate to be sold, and the proceeds of that real estate to be distributed for the

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purpose for which it is given, which the executors alone by law could perform, then there is an implied authority — an implied power given by the will to sell the estate, and that the executor who is to distribute the money is to sell it. Several cases were cited which confirm that proposition, *Forbes v. Peacock* among them. And, upon looking to these cases, there is not a single case or a single authority which says that the simple charge of the estate with the payment of debts does more than make a charge upon the estate in the hands of the devisee if the estate is devised, in the hands of the heir at law if the estate devolves by the law of inheritance upon the heir at law. The only authorities which had the aspect of constituting the executor, or giving the executrix or executor an implied power to sell, was the *dictum* of Vice Chancellor Shadwell, in the case of *Forbes v. Peacock*, twice before him, and also before the Court of Exchequer, and in one of those cases, see 11 Sim. 152, and 12 Sim. 541, the vice chancellor of England is reported to have said, "If a testator charges his real estate with the payment of his debts, that *prima facie* gives his executor power to sell the estate, and to give a good discharge for the purchase money. That was all that I decided on the argument of the demurrer." If that is correctly reported, it would imply that the vice chancellor was of opinion that a simple charge of debts without more — without any terms in the will indicating an intention on the part of the testator that the estate should be sold — was an implied authority given to the executor to sell. That would be a solitary authority, because there is none other to be found that goes to the same extent; but the vice chancellor is merely stating what he had decided before. The first time the case of *Forbes v. Peacock* was before him, the proposition he is there reported to have stated is quite distinct from this, because there it is perfectly clear he gave his opinion upon the supposition (the will in that case authorized the sale of the property) that the testator meant it to be sold, and that the executor was the proper person to carry that intention into effect; and he cites, in giving his judgment, a case of *Ward v. Devon*, before him, which was to that effect: "Sell all off, both real and personal property, and divide the produce between my wife Mary Ann Ward, and my sons and daughters, each to share alike. The law gives the house at Teddington to the youngest son; but it is my will to sell all. I appoint Mr. Robert Ward my brother, and my wife Mary Ann Ward my executors." That was the whole of the will; and it was held, in that case, there was clearly a power to sell, which must be executed by the executor; and so upon the purview of the whole will in *Forbes v. Peacock* he was of the same opinion, and that was the opinion which the Court of Exchequer on the case sent to them also entertained. That was the law of the subject. When the case was before the lord chancellor, he expressly guarded himself from deciding that a simple charge of the estate would amount to a power to sell. In fact, there is no case that goes to that extent. The only doubt that we entertained in our minds was, whether in this case there was enough enabling us to say that the testator meant his estate should be sold for the same purpose. It was not that he subjected his real

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estate merely to the payment of his just debts, but his funeral and testamentary expenses and charges attendant thereon, and the legacies subsequently bequeathed. He clearly gave no power of sale; but it was contended that from his charging the estate with funeral and testamentary expenses, which was for an immediate purpose which could not be long delayed, it must be implied that he meant the executrix to sell.

Now, we have considered those cases, and we have found no authority for such a proposition. As to the exception in this case also, "except my Bala houses," which he does not wish to devise, it might be said to be the intention that the Bala houses should be sold, although perhaps not the other property, for the purpose of paying the testamentary expenses and charges; just as if he had made an appointment of the Bala houses to be sold for that purpose, and as if he had given a power to the executor for that purpose. But we are of opinion this really carries the case no further; it only subjects the estate in the hands of the heir at law to a charge for funeral and testamentary expenses, and the charges attending the proof of the will, which the executrix must enforce through the medium of a court of equity; and therefore, we think, in this case the executrix had no power to sell or mortgage the estate. She was led into a mistake by the advice she has received for the purpose of avoiding an equity suit. It is not within the principle of any of the cases in which it has been held there is an implied power of sale and an implied power of mortgage by the will. We have perfectly satisfied ourselves on that head, and therefore the result is, the rule in this case must be discharged.

ALDERSON, B. added: The strongest case was the case in *Dyer*, where he appointed lands for the payment of his debts; here he has only charged them, but he has not said for what purpose. In *Dyer* it was an appointment of a particular estate in general for payment of debts; in this case it is a general charge on all the lands, with the exception of particular lands—for what purpose those lands were excepted, nobody knows.

Rule discharged.

BLACK v. JONES.¹

Hilary Term, January 29, 1851.

Witness — Competency of Creditor under Deed of Trust — New Trial — Misdirection on collateral Point.

A creditor, who is a party to a deed of assignment by his debtor to a trustee for creditors, is a competent witness for the trustee in an action to enforce the deed.

Where a judge, in summing up to the jury, mistakes the law upon a collateral point, upon which a bill of exceptions would not lie, a new trial will not be granted as of right, but the court will exercise its discretion according to its opinion of the result being in accordance with the justice of the case.

¹ 20 Law J. Rep. (n. s.) Emsch. 132.

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THIS was an interpleader issue to try whether certain goods, seized under a *fi. fa.* against one W. Cutress, at the suit of the defendant, were at the time of the writ being delivered to the sheriff the property of the plaintiff as against the defendant.

At the trial, before Platt, B., at the first sittings for Middlesex, in this term, it appeared that the plaintiff claimed under a deed executed by the defendant, assigning (*inter alia*) the property seized to him for the benefit of the creditors of the defendant, and dated prior to the judgment under which the *fi. fa.* issued. The plaintiff was not a creditor, and the deed had not been executed or assented to by any creditor, except a person of the name of Wilkins. There were various circumstances relied upon by the counsel for the defendant to show that the deed was executed after the delivery of the writ, and that it was altogether fraudulent, and in his address to the jury he particularly commented upon the fact that the only creditor, whose assent to the deed was even alleged, was not called as a witness; and that the jury ought, therefore, to find that it was a voluntary and void deed, there being no relationship of trustee and *cestui que trust* created between the plaintiff and the creditors. His lordship, in summing up to the jury, stated that the witness Wilkins could not have been called on behalf of the plaintiff. The jury found a verdict for the plaintiff; and

E. James now¹ moved for a rule for a new trial for misdirection. It was of the utmost importance that the witness Wilkins should have been called, as without the assent of a creditor such a deed is purely voluntary, and operates only as a power to the trustee to collect the debts. *Acton v. Woodgate*, 2 Myl. & K. 492; s. c. 3 Law J. Rep. (n. s.) Chanc. 83. *Harland v. Binks*, 20 Law J. Rep. (n. s.) Q. B. 126. His signature was indeed proved by a witness, but the facts as to the period of execution and the nature of the transaction might have appeared very different had he been called; and if he were a competent witness, the jury might have been much influenced by his not being called, while upon his lordship's statement of the law his absence was accounted for. It is submitted he was a competent witness, as not being within the exception of the 6 & 7 Vict. c. 85. He was not a person in whose immediate and individual behalf the action was brought. It has been held, that in an action by a bankrupt against his assignees to try the validity of the *fiat*, a creditor is a competent witness for the assignees. *Columbine v. Penhall*, 19 Law J. Rep. (n. s.) Q. B. 302.

[*Parke*, B. That case is distinguishable, because the assignees would only be benefited; here the assignee is suing.]

He is not suing for the immediate and individual behalf of the witness, who would only get a ratable part as one of a class. A bankrupt is a competent witness to prove the petitioning creditor's debt. *Groom v. Watson*, Ibid. C. P. 364.

[*Pollock*, C. B. Assuming he was competent, was what my brother Platt said a misdirection, upon which a bill of exceptions could have been tendered?]

¹ January 22, before POLLOCK, C. B., PARKER, ALDERSON, and PLATT, BB.

Black v. Jones.

It is apprehended that there may be a misdirection, although a bill of exceptions would not lie.

Cur. adv. vult.

The judgment of the court was now delivered by

POLLOCK, C. B. In this case, which was tried before my brother Platt, and a verdict found for the plaintiff, a rule to show cause why there should not be a new trial was moved for upon the ground of misdirection. The misdirection complained of was, that the defendant's counsel contended that a certain witness of the name of Wilkins ought to have been produced by the plaintiff. It appeared he had been there on a former day, and the learned counsel contended, on behalf of the defendant, that he ought to have been called for the plaintiff. In summing up to the jury, my brother Platt stated that if he had been there he could not have been a witness for the plaintiff. My brother Platt's impression is, that he did not go beyond expressing a very strong opinion of his own, that he would not have been a competent witness; but he left the case to the jury, having first remarked that though not called by one party, if he could have given any material evidence, he was a witness who could have been called by the other party; but he left the case ultimately to the jury upon this point: "Do you believe the case as stated by those witnesses who are called in the absence of Wilkins, he not being called?" And the jury said they did believe those witnesses, although Wilkins was not called; the result of which is, that it is really quite unimportant whether the learned judge was correct or not on the point that Wilkins would or would not have been a witness had he been called. And we are all of opinion upon this ground that there ought to be no rule. I must express my own personal opinion; for I am not sure whether the rest of the court agree.

[*Parke* and *Alderson*, BB., intimated that they all agreed.]

My own impression is, that where a judge expresses an opinion on a point of law, not for the purpose of directing the jury on the matter which is directly and immediately before them, and which, therefore, could not be the subject matter of a bill of exceptions, the point being adverted to for some collateral purpose, and to explain and give effect to some piece of evidence, that is a point as to which a bill of exceptions could not be tendered, because a bill of exceptions can only be tendered on those matters of law on which a judge is bound to instruct the jury, in order that, he telling them the law and deciding the fact, a just conclusion may be the result of the labors of both. I would observe, however, that if ever the court should feel that a great injustice had been done, that a mistake has occurred fatal to the administration of justice, and brought about by an erroneous statement of a point of law, no doubt the court would in the exercise of its sound discretion give relief; but we consider in a case where the point of law is purely collateral, that it is not only the right of the court, but their duty, to see whether in the particular case the supposed misdirection really has produced any miscarriage. Addressing our minds to that subject, we think it has not in the present instance;

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and conceding to the bar that wherever there has been a misdirection on the point immediately at issue, a rule for a new trial is a right; conceding that, we think it is not a right where the point of law is purely collateral, and is introduced merely by way of illustrating some question of fact in the course of the trial.

We are all of opinion, and my brother Platt himself is now of opinion, and instructs me to say so, that if Wilkins had been called he would have been a good witness, and might have been examined, and the objection, such as it was, is removed by the late statute upon the subject of evidence, commonly called Lord Denman's Act. Upon these grounds, we think, in this case there ought to be no rule.

Rule refused.

HELLAWELL v. EASTWOOD & others.¹

Michaelmas Vacation, December 2 and 16, 1850.

Replevin — Court Baron of the Honor of Pontefract — County Courts Act, 9 & 10 Vict. c. 95 — Trespass — Distress — Machines fixed to Floor.

The Court Baron of the Honor of Pontefract was an immemorial court, and the lord had power to grant replevins and hold pleas in replevin, and also to hold pleas in all personal actions arising within the jurisdiction up to 40s. By the 17 Geo. 3. c. 15, the jurisdiction was extended to 5*l.*, but there was a proviso that all plaints in replevin should be had and be proceeded in and be removable in the same manner as if the act had not passed. By the 2 & 3 Vict. c. 85, s. 1, after reciting the 17 Geo. 3. c. 15, it was enacted that "the present jurisdiction and practice of the Court Baron of the Honor of Pontefract shall (with certain exceptions) cease and determine, and thenceforth the said court shall be constituted and be a court of record, under the name of the Court of the Honor of Pontefract." The 4th section extended the jurisdiction of the court to 15*l.* The 56th section enacted, that six months after the passing of any general act for the recovery of small debts, the operation of which should interfere with the powers given to the said court by this act, "every clause, matter, or thing in the act contained which shall extend or be construed to extend to give to the court hereby appointed any local or separate jurisdiction shall cease and determine." The act did not specifically mention replevins. By the 9 & 10 Vict. c. 95, s. 5, (the County Courts Act) power was given to the Queen in council to order that any court holden for the recovery of debts under the provisions of certain acts specified in schedules A and B, should be held as a county court, with power to alter or vary the districts, and it provided, "that from and after the time mentioned in any such orders the act or acts under which such court is now constituted, so far as the same relate to the establishment or jurisdiction or practice of a court for the recovery of small debts or demands, shall be repealed, but not so as to revive any act thereby repealed;" and the 6th section enacted that as soon as a court should be established under the aforesaid powers, "every act of Parliament, heretofore passed, so far as the same respectively relate to or affect the jurisdiction and practice of the court so established or ordered to be holden as a county court, shall be repealed." By the 119th and 120th sections, actions of replevin are directed to be brought without writ in the courts held under the act, and the plaints are to be entered in the court holden for the district. The 2 & 3 Vict. c. 85, was specified in schedule A, and an order was duly made establishing a county court for the district included within the jurisdiction of the Court of the Honor of Pontefract as modified by that act.

The defendant being the landlord of certain premises occupied by the plaintiff seized as a distress for rent certain cotton spinning machines, which were fixed by screws, some into the wooden floor, and some into lead which had been poured in a melted state into holes in the stone for the purpose of receiving the screws. The machines having been replevied

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by a replevin issued out of the Honor Court of Pontefract, the defendant entered and seized them a second time:—

Held, first, in the absence of evidence that any replevins had ever been issued from the Court Baron of the Honor of Pontefract, except in cases in which there was jurisdiction to try the plaintiffs, that after the constitution of the new county court no replevin could be issued from the Court Baron.

Semble, there may be a franchise of granting replevins independently of the franchise of trying the plaintiffs:—

Held, secondly, that the machines never became part of the freehold, and were distrainable.

TRESPASS for breaking and entering Apsley Mills, in the possession of the plaintiff, and seizing divers goods, machinery, and fixtures.

Plea — Not guilty by statute.

It appeared at the trial, before Alderson, B., at the York Spring assizes, 1850, that the plaintiff held the premises in question as tenant of the defendants; and that after a distress for rent had been put in by the defendants, under which a seizure was made of certain cotton-spinning machines, which were fixed by screws, some into the wooden floor, and some into lead which had been poured in a melted state into holes in the stone for the purpose of receiving the screws, a replevin, without any plaint entered, had been obtained out of the Court of the Honor of Pontefract, (within which the mills were situated,) and the possession abandoned, but subsequently it being considered that the replevin granted was void, a reëntry was effected, and the goods, machinery and fixtures ultimately sold. Evidence was given that the lord of the Court Baron of Pontefract had from time immemorial exercised the right of granting replevins, with reference to cases tried in the court, but no evidence was given of any exercise of a franchise to grant replevins independently of the franchise of holding pleas in cases of replevin.

The 17 Geo. 3, c. 15, 2 & 3 Vict. c. 85, and 9 & 10 Vict. c. 95, were referred to, and it was contended, on behalf of the plaintiff, that the replevin was valid; and that, at all events, the machines fixed to the floor were not by law distrainable; and, on behalf of the defendant, that the replevin was void, or if valid, that trespass was not the right form of action. His lordship was of opinion that the Court of the Honor of Pontefract had ceased to exist, and therefore that the replevin was void, and a verdict was returned for the plaintiff for 460*l.* 3*s.*, being the value of the fixed machinery alleged to be improperly seized, with liberty to him to move to increase the verdict to the full value of the goods seized, if the court should be of opinion that the replevin was valid, and trespass the right form of action. The defendants also had leave to enter a verdict for them if the court should be of opinion that the fixed machines were by law distrainable.

Watson having accordingly obtained a rule to increase the damages; and

Martin having obtained a rule to enter a verdict for the defendants,—

Hoggins and *Pashley* showed cause against the former rule, (De-

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ember 2, 1850.) The replevin granted by the Court of the Honor of Pontefract was void, there being no power to exercise the franchise of granting replevins since the passing of the County Courts Act. The old Court Baron of the Honor of Pontefract held pleas in all personal actions arising within its jurisdiction where the debt or damages were under 40s. By the 17 Geo. 3, c. 15, this prescriptive right is recited, but the jurisdiction was extended to 5*l*.; but there was in that statute an express proviso, "that all pleas in replevin should be had and proceeded in and removable in the same manner as if the act had not passed." The 2 & 3 Vict. c. 85, after reciting the 17 Geo. 3, c. 15, put an end to the jurisdiction of the old court, but reconstituted it with extended powers.¹ Then, the 9 & 10 Vict. c. 95, was passed, and power given to the queen in council to alter or abolish any of the courts mentioned in the schedules A and B.² Pontefract was in schedule A, and an order in council pursuant to

¹ Sect. 1 enacts, "That from and after the 1st of November, 1839, the present jurisdiction and practice of the Court Baron of the Honor of Pontefract aforesaid shall (except with respect to the town of Barnsley and such other parishes, townships and places within the Honor of Pontefract as are also within the jurisdiction of the said Barnsley Lower Court of Requests and the said Barnsley Upper Court of Requests) cease and determine, (except as to any cause or matter commenced or pending therein before or on the said last-mentioned day, as to which cause or matter the jurisdiction and practice of the said Court Baron shall continue the same as if this act had not passed,) and thenceforth the said court shall be constituted and be a court of record, under the name of "The Court of the Honor of Pontefract."

Sect. 4 enacts, "That the said Court of the Honor of Pontefract shall have the same power, practice, and jurisdiction in proceedings in replevin as the Court Baron of the Honor of Pontefract now has, and shall be empowered and authorized to hold pleas of debt where the debt sought to be recovered shall not exceed the amount of 15*l*., and all other personal actions arising within the jurisdiction of the said court, where the damages sought to be recovered shall not exceed the sum of 5*l*., and where the defendant or defendants in any such action, or any one or more of such defendants, shall at the time of the commencement of such action reside within the jurisdiction, or keep any house, warehouse, shop, counting-house, stall, or other place of business or dealing whatsoever, or otherwise trade or deal therein."

Sect. 56 enacts, "That at the expiration of six calendar months next after any general act shall be passed for the recovery of small debts, and the operation of which general act shall affect or interfere with the powers given to the said Court of the Honor of Pontefract by this act, every clause, matter and thing in this act contained which shall extend or be construed to extend to give to the court hereby appointed any local or separate jurisdiction shall cease and determine."

² Sect. 5 enacts, "That it shall be lawful for her majesty, with the advice of her privy council, to order that any court holden for the recovery of small debts or demands within the provisions of any act cited in either of the schedules annexed to this act, and marked (A) and (B) respectively, shall be holden as a county court; and it shall be lawful for her majesty, with the advice aforesaid, to assign a district to every such court, either greater or less than the district in which the court holden under the provisions of any such act now has jurisdiction, and to alter the place of holding any such court, or to order that any such court be abolished; and every such court shall continue to be holden under the act, according to which it is now constituted or regulated, until the time mentioned in any such order which shall be made with reference to such court; and from and after the time mentioned in any such order the act or acts under which such court is now constituted, so far as the same relate to the establishment or jurisdiction or practice of a court for the recovery of small debts or demands, shall be repealed, but not so as to revive any act thereby repealed; and such court so ordered to be holden as a county court shall thenceforth be holden as a county

the 5th section of the County Courts Act was made, and the County Courts Act put in operation, among other places, for this district. All replevins must now, therefore, be tried in the county court under sects. 120, 121; and there was no evidence to show that there was any prescriptive right to grant replevins out of the Court Baron, independently of the franchise of hearing the complaints, even supposing there can be such separate right. But it is contended that the 2 & 3 Vict. c. 85 having been repealed, the old jurisdiction of the Court Baron is revived, and now exists as it did before the 17 Geo. 3, c. 15. The answer to this argument is, that the 17 Geo. 3, c. 15, absolutely destroyed the ancient jurisdiction of the Court Baron and substituted a new court, and the abolition of the latter will not revive the old court. *Warren v. Windle*, 3 East, 205. The 5th section also provides, that the repeal of the former acts shall not "revive any act thereby repealed." It would be a strange anomaly to hold that the Court Baron, with its general jurisdiction up to 40s., was recalled into existence by the County Courts Act, the very object of which was to establish uniformity in the local courts. Nor can it be established that there exists a franchise to grant replevins independently of the power to hear the complaints. The Court Baron has the right to grant it by prescription only, and this is incidental to the power of hearing. On this point they cited *Hallet v. Birt*, Carth. 380; s. c. 5 Mod. 248, 1 Ld. Raym. 218, 2 Salk. 580, Skin. 674. Vin. Abr. "Replevin," E, 12, Z, 21, Com. Dig. "Pleader," 3, K, 3, 2 Inst. 139, 4 Inst. 266, Bac. Abr. "Replevin," C, Kitchen on Courts, 95, b, Com. Dig. "Copyhold," R, 14. *Wilson v. Hobday*, 4 M. & S. 120. *Jentleman's Case*, 6 Rep. 11. Co. Litt. 58, a. *Griffiths v. Stephens*, 1 Chit. Rep. 196. Statute of Marlbridge, 52 Hen. 3, c. 21, 1 & 2 Ph. & M. c. 12, s. 3.

Watson, Ellis, and R. Hall, in support of the rule. The franchise of granting replevins belonged to the lord of the Honor of Pontefract prior to the statute of 17 Geo. 3, c. 15, and there is no legal difficulty in the existence of this power, although he may no longer be able to try the complaints. The sheriff is now in this position since the County Courts Act. *Edmonds v. Challis*, 7 Com. B. Rep. 413; s. c. 18 Law

court under this act, and in all respects as if it had been originally constituted under the provisions of this act."

Sect. 6 enacts, "That as soon as a court shall have been established in any district under this act, and also at the time mentioned in any such order which shall have been made as aforesaid for holding any of the courts mentioned in either of the said schedules as a county court under this act, the several provisions and enactments of the said act of Parliament, 8 & 9 Vict. c. 127, and of every other act of Parliament heretofore passed, so far as the same respectively relate to or affect the jurisdiction and practice of the court so established or ordered to be holden as a county court, or give jurisdiction to any court, or to any commissioner of the Court of Bankruptcy, with respect to judgments or orders obtained in the court so established or ordered to be holden as a county court, shall be repealed."

Sect. 119 enacts, "That all actions of replevin in cases of distress for rent in arrear or damage *faisan* which shall be brought in the county court shall be brought without writ in a court held under this act."

Sect. 120 enacts, "That in every such action of replevin the plaint shall be entered in the court holden under this act for the district wherein the distress was taken."

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J. Rep. (N. S.) C. P. 164. By the statute of Marlbridge power was given to the sheriff to grant replevins out of court, but he could not enter any liberty that had return of writs until the bailiff of the liberty had made default. This implies that there might be a right by charter in the officers of the lord's court to grant replevins. On this point they cited *Mounsey v. Dawson*, 6 Ad. & E. 752; s. c. 6 Law J. Rep. (N. S.) K. B. 251. *Jewison v. Dyson*, 9 Mee. & W. 540; s. c. 11 Law J. Rep. (N. S.) Exch. 401. *Tesseyman v. Gildart*, 1 N. B. 292. Fitz. Nat. Brev. 72 F, and 73 B. *Thompson v. Farden*, 1 Man. & G. 537; s. c. 9 Law J. Rep. (N. S.) C. P. 284, Vin. Abr. "Prescription," S. Looking at the different statutes, the jurisdiction to grant replevins still exists. The 17 Geo. 3, c. 15, did not effect that jurisdiction at all, and the preamble of the 2 & 3 Vict. c. 85, does not refer to replevins. The Court Baron is not altogether abolished by that statute, but only its jurisdiction for debts and demands. It clearly remained untouched as to the excepted district of Barnley, and the court therefore still exists as to the other districts, unless in terms destroyed. But even if the power to grant replevins was affected by the 2 & 3 Vict. c. 85, it is now restored by the repeal of that act. That branch of the Court of the Honor of Pontefract was not established by any statute so as to be within the 5th section of the County Courts Act. The substituted court is abolished, but the old court remains. *Dwaris* on Statutes, 535.

PARKE, B. This question has been elaborately argued, and it has satisfied my mind that in this case we must assume that the right to grant replevins that has been exercised is connected with the right of trying them, and that the right of trying them is taken away by the operation of the statute. It is not necessary to give an opinion whether there can exist by law a right of taking replevins in the officers of the lord's court that existed by charter, although I think the weight of authority preponderates to the extent of showing there could be such a right in the lord of the franchise to try replevins, and a right in his steward or officer, in the first instance, to grant replevins, which may exist by charter or prescription. The question, however, is, whether in this case it is or is not taken away. It is said that the power of granting replevins does, in fact, exist, and that that inference may be collected from the statute of Marlbridge. That point, however, we need not decide here, as no exercise of such a franchise is to be found in this case. That being so, the simple question is, whether the power of holding suits in replevin is taken away. Now, the Court Baron of the Honor of Pontefract is an immemorial court, and its jurisdiction is extended by 17 Geo. 3, from 40s., in ordinary cases, to the amount of 5l., and that act recognizes the right of proceedings in replevin, because there is a clause in it which provides that the lord may have a right to hear complaints in replevin as if the act had not been made. That is a parliamentary recognition of the right of holding pleas. But then comes the 2 & 3 Vict. c. 85. That statute extends the jurisdiction in ordinary suits to 15l., and it commences by a clause — [his lordship read the clause] — which is a positive

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enactment that all this jurisdiction and practice in the Court Baron shall cease and determine. If there were nothing more in the case than that, it puts an end to the practice of hearing replevins in that court, and of granting replevins out of that court. By the other provisions of that act, the power of granting replevins is given to a court to be constituted by that act to be called the "Court of the Honor of Pontefract." And then follows the clause fixing the period at which the court shall cease and determine. [His lordship read the section.] This means that the new court should be put an end to, and not that the old court should be restored. Then the intention of the legislature in passing the 9 & 10 Vict. c. 95, seems to have been that all inferior jurisdictions for the recovery of small debts should cease and determine. Whether that has been effected depends upon the statute. [His lordship read the 5th section.] The order was made by her majesty for the abolition of the Court of the Honor of Pontefract, and the effect is, that from and after the time mentioned in any such order, the act or acts under which such court is now constituted, that is, the 2 & 3 Vict., so far as the same relate to the establishment or jurisdiction or practice of a court for the recovery of small debts or demands, shall be repealed. Therefore the Court of the Honor of Pontefract, so far as it entertains jurisdiction or practice for the recovery of small debts or demands, is repealed, and it puts an end to the power of the court to hold replevins. What is the effect of that? It does not repeal the clause in the former act that repeals the old one; it only repeals the new jurisdiction. It would be inconsistent to suppose, when the object of the statute was to put an end to all courts for the recovery of small debts, and to give one general court for the recovery of small debts, that it intended to set up former courts the jurisdiction of which was abolished. That is clear when you look at the following words, which say, "but not so as to revive any act thereby repealed." I think, on the ordinary construction of acts of Parliament, looking at the words of this act, the only effect of this act is to put an end altogether to the new Court of the Honor of Pontefract, but the old court was put an end to before, and it does not revive it, and, therefore, that the old court has no jurisdiction now to entertain suits of replevin. The evidence, as already observed, did not show any franchise to grant replevins, independently of the right to try them, and that is put an end to.

ALDERSON, and PLATT, BB., concurred.

Rule discharged.

Watson, Ellis, and R. Hall, December 3d, showed cause against the rule to enter a verdict for the defendants. The fixed machinery was not distrainable, for "nothing shall be distrained for rent that cannot be rendered again in as good plight as it was at the time of the distress taken." Co. Lit. 47, a. The rule is thus laid down in *Amos and Ferard on Fixtures*, p. 314, 2d edition, "It is an established rule of law, that things adhering to the freehold cannot be taken under a distress, whether for rent, services, fines, or duties, &c. And this rule holds, not merely in respect of such things as become by annex-

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ation parcel of the inheritance, and are not afterwards serviceable, but it applies to fixtures of whatever nature or construction, and whether put up for trade or for any other purpose." *Hallen v. Runder*, 1 Cr. M. & R. 266; s. c. 3 Law J. Rep. (N. S.) Exch. 260. *Trappes v. Harter*, 2 Cr. & M. 153; s. c. 9 Law J. Rep. (N. S.) Exch. 24. *Minshall v. Lloyd*, 2 Mee. & W. 450; s. c. 6 Law J. Rep. (N. S.) Exch. 115. *Dalton v. Whitlem*, 6 Jurist, 1063.

[*Parke, B.* The present case stands quite upon the boundary.]

Articles fixed by screws are fixtures, and, therefore, not removable. "Things fixed to the freehold cannot be distrained, as the doors or windows of a house." Com. Dig. "Distress," C. A millstone taken out to be picked is not distrainable; and the same rule applies to the present machines, which are the fixtures of the cotton mill. They cited *Lyde v. Russell*, 1 B. & Ad. 394; s. c. 9 Law J. Rep. K. B. 26. *Duck v. Braddyll*, M.Cle. 217. Bro. Abr. "Distresse," pl. 23. *Darby v. Harris*, 1 Q. B. Rep. 895; s. c. 10 Law J. Rep. (N. S.) Q. B. 294. *Colegrave v. Dias, Santos*, 2 B. & C. 76; s. c. 1 Law J. Rep. K. B. 239. *Davis v. Jones*, 2 B. & Ald. 165. *Wansbrough v. Maton*, 4 Ad. & E. 884; s. c. 5 Law J. Rep. (N. S.) K. B. 150. *The King v. Otley*, 1 B. & Ad. 161; s. c. 9 Law J. Rep. M. C. 11. *Longstaff v. Meagoe*, 2 Ad. & E. 167; s. c. 4 Law J. Rep. (N. S.) K. B. 28. *Morley v. Pincombe*, 2 Exch. Rep. 101; s. c. 18 Law J. Rep. (N. S.) Exch. 272. *Taylor v. Stendall*, 7 Q. B. Rep. 634; s. c. 14 Law J. Rep. (N. S.) Q. B. 301.

Hoggins, Pashley, and H. Hill, in support of the rule. The main rule applicable to this case is, that all chattels which are so fixed to the land that they can easily be removed from one part of the land to another, without injury to the land, may be distrained. There is also another rule on the subject, that the goods distrained should be capable of being restored in the same plight as they were in at the time of taking. If those rules are applied to the present case, the articles distrained are properly the subject of distress. They cited *Herlakenden's Case*, 4 Rep. 62. *Cooke's Case*, Moor, 177. *Simpson v. Hartopp*, Willes, 512. 2 Black. Com. 428, 3 Black. Com. 10. *Avery v. Cheslyn*, 3 Ad. & E. 75. 11 Répertoire de Merlin, 37. Taylor's Elements of the Civil Law, 475. Mackeldey on the Roman Law, s. 148. Pothier on the Customs of the Duchy of Orleans, p. 647, ed. 1780. *Sheen v. Rickie*, 5 Mee. & W. 175; s. c. 8 Law J. Rep. (N. S.) Exch. 217. *Pool v. Longvill*, 3 Salk. 166. *Pitt v. Shew*, 4 B. & Ald. 206. *Mackintosh v. Trotter*, 3 Mee. & W. 184; s. c. 7 Law J. Rep. (N. S.) Exch. 65. Gilbert on Distresses, p. 38.

Cur. adv. vult.

The judgment of the court was now (December 16) delivered by

PARKE, B. There is a case of *Hellawell v. Eastwood*, argued a few days ago, when a part of the case was disposed of. The question remaining to be disposed of in this case is, whether cotton-spinning machines, which were fixed by means of screws, some into

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the wooden floor, and some into lead, which had been poured in a melted state into holes in the stone for the purpose of receiving the screws, were by law distrainable for the rent of the mill in which they were affixed. Before the machines were so attached they were mere chattels, and undoubtedly were distrainable chattels, and the question is, whether they lost that character by being attached to the fixture in the manner described. This question is to be determined exactly in the same way as it would have been before, if the statutes on the subject had not passed. No chattels could be distrained which were not the subject of distress at common law, except those provided for by the statute, and this description of chattel is not. Neither the power to sell in distress given by the statute of Will. 3, nor the power to impound upon premises given by the statute of 11 Geo. 2, extends the right of distress to chattels not before the subject of it; still less does the right of a landlord for a year's rent before the goods taken in execution can be moved, afford a reason for holding that all goods which can be taken in execution can also be distrained. We must decide the case in the same way as if the distrainor were obliged to take the chattels distrained immediately to a public or private pound. At common law, things fixed to the freehold, and which became part of it, could not be distrained for two reasons. Chief Baron Gilbert says, "Whatever is part of the freehold cannot be distrained, for what is part of the freehold cannot be severed from it without detriment to the thing itself in the removal; consequently, that cannot be a pledge which cannot be restored *in statu quo* to the owner. Besides, what is fixed to the freehold is part of the thing demised, and the nature of distress is not to resume part of the thing itself for the rent, but only the *inducta et illata* upon the soil or house." See Gilbert on Distresses, pp. 34 and 48. And upon the sole ground that they are parcel of the freehold, by construction of law, keys, windows, shutters, concerning the realty, are not liable to be distrained. It was besides a rule of common law, that things which could not be restored in the same plight and condition could not be distrained for rent. That is laid down in Coke upon Littleton, 47, and in Gilbert on Distresses in the part I have already cited.

We have, therefore, to decide whether these machines fall within either the categories, otherwise they are not protected. They do not fall within the latter, for upon being taken to the pound they might be brought back without damage to themselves. They are not of a perishable nature, and would not suffer by a careful removal. If it were necessary to take them to pieces in order to remove them, that circumstance would make no difference, for that might occur to chattels with respect to which there is no question. As for instance, four-post bedsteads could not be carried to the pound without being first taken to pieces, and the distrainor would have no reason to complain that they were restored to him in a disjointed state at the pound, where he must attend to receive them. It would save him the trouble of taking the bedsteads to pieces again, in order to replace them, if they had been restored entire. Nor does it make

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any difference that the distrainee would be obliged to incur the expense of refixing the machinery. Precisely the same objection might be made to distress on any article, if it required expense to carry back from the pound, and restore to its former position. A distrainee at common law must be at the trouble and expense of taking back his goods from the pound. This practical inconvenience is now obviated by the power of impounding upon the premises. The only question, therefore, is, whether the machine when fixed was parcel of the freehold, and this is a question of fact, depending on the circumstances of each case, and principally on two considerations: First, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed *integre, salve et commode*, or not, without injury to itself or the fabric of the building. Secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usus causa*, or merely for a temporary purpose, (see the Year Book, 20 Hen. 7, c. 13,) or the more complete enjoyment and use of it as a chattel. Now, in considering this case, we cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal without the least injury to the fabric or the building or themselves, and the object and purpose of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels. They never were part of the freehold any more than a carpet would be which is attached to the floor by nails, for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures, and other matters of an ornamental nature which have been slightly attached to the walls of the dwelling as furniture, and which is probably the reason why they and similar articles have been held in different cases to be removable. The machines would have passed to the executor. That is laid down by Lord Lyndhurst, in the case of *Trappes v. Harter*. They would not have passed by the conveyance or demise of the mill. They never ceased to have the character of movable chattels, and were, therefore, liable to the defendant's distress. The result will be, that the plaintiff's rule is discharged, and the defendants' rule made absolute.

Rules accordingly.

REED v. LAMB.¹

Hilary Term, January 20, 1851.

Pleading — General Issue — Frauds, Statute of, 29 Car. 2, c. 3, s. 4.

A plea that the promise sued upon was a promise to answer for the debt of another person, and that there was no agreement or memorandum or note thereof in writing and signed by the defendant, is bad as amounting to the general issue.

¹ 20 Law J. Rep. (N. S.) Exch. 161.

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ASSUMPSIT upon a guaranty.

Plea — That the promise of the defendant was a promise to answer for the debt of one A. B., and that there was no agreement or memorandum or note thereof in writing and signed by the defendant or any other person, thereunto by him lawfully authorized. **Verification.**

Special demurrer and joinder.

Rodwell, in support of the demurrer. The plea is bad, as amounting to the general issue. *Maggs v. Ames*, 4 Bing. 470; s. c. 6 Law J. Rep. C. P. 75, in which the plea was held good, has been overruled by *Buttemere v. Hayes*, 5 Mee. & W. 456; s. c. 9 Law J. Rep. (N. S.) Exch. 44, and *Leaf v. Tuton*, 10 Ibid. 393; s. c. 12 Law J. Rep. (N. S.) Exch. 69. *Lilley v. Hewitt*, 11 Price, 494, was a previous decision to the same effect.

The court then called on

White. This is a plea under the 4th section of the Statute of Frauds, which differs from the 17th, which was pleaded in *Leaf v. Tuton*. The 17th section enacts, that no contract shall be good, so that the general issue in accordance with the new rules sets up the defence of the statute, for it is a denial of the contract. But the words of the fourth section are, that no action shall be brought, and the defence should therefore be pleaded, like the plea of the non-delivery of a signed bill in an action by an attorney.

[*Alderson*, B. That is a different case. There he has the right of action, but the time of suing is postponed by the statute. A contract, under the 17th section, is invalid in point of law; and what is the difference between that and a contract upon which no action can be brought? The Court of Common Pleas have decided against a plea of the analogous statute of 9 Geo. 4, c. 14, s. 6. *Turnley v. Macgregor*, 6 Man. & G. 46; s. c. 12 Law J. Rep. (N. S.) C. P. 295.]

In *Hill v. Sydney*, 7 Ad. & E. 956; s. c. 7 Law J. Rep. (N. S.) Q. B. 87, it was held that the defence under the 2 Geo. 2, c. 23, that a plaintiff was not admitted an attorney of the court was not admissible under the general issue. *Buttemere v. Hayes*, does not overrule *Maggs v. Ames*, as the latter case decided that the statute might be pleaded, although it might also have been given in evidence under the general issue.

Per curiam.¹ It was decided in *Carrington v. Roots*, 2 Mee. & W. 248; s. c. 6 Law J. Rep. (N. S.) Exch. 95, that there was no difference in the legal effect of the 4th and 17th sections; and *Leaf v. Tuton* is a distinct authority that a plea under the 17th section amounts to the general issue, and therefore a plea under the 4th section is bad for the same reason.

Judgment for the plaintiff.

Doe d. Beech & another v. Nall.

DOE d. BEECH & another v. NALL.¹

Hilary Term, January 27, 1851.

Power of Appointment — General or limited to Children.

M. B. being seized in fee of certain premises and also possessed of certain stock, by settlement prior to her marriage with J. C., assigned the said stock in trust after marriage for her separate use or such person or persons as she should by deed appoint, and conveyed her said real property in trust for herself until her marriage with J. C., and then to her separate use during their joint lives, and after her decease to the use of her husband J. C. for life, and after his death "to the use of the child and children of the said M. B. by the said J. C., or other person or persons, and for such estate and subject to such powers and provisoes as the said M. B. should, notwithstanding her said intended coverture, by deed appoint:" —

Held, that the power of appointment could only be exercised in favor of the child or children of M. B. by J. C., or other after-taken husband.

EJECTMENT for certain premises in Liverpool.

At the trial, before Rolfe, B., at the Liverpool Spring assizes, 1850, a verdict was found for the lessors of the plaintiff, subject to a case which was stated for the opinion of the court. The material facts were, that Martha Beech being possessed of certain personal property, *inter alia* 300*l.* navy 5*l.* per cents., and being seized in fee of the premises in question, executed a deed of settlement shortly before her marriage with John Cummins. By this deed it was declared (*inter alia*) that her trustees, Elias Wild and Ebenezer Nall, should stand possessed of and interested in the said sum of 300*l.* navy 5*l.* per cents., and the interest, dividends, and annual produce thereof, in trust for the said Martha Beech until the marriage between her and the said John Cummins, and from and immediately after the solemnization thereof, then upon trust to pay, the interest, dividends, and annual produce of the said sum of 300*l.* navy 5*l.* per cents., when, and as the same respectively should from time to time be by them received or receivable, unto the said Martha Beech for and during her life to and for her own sole and separate use and benefit, or to such person or persons as she by writing under her hand should from time to time, notwithstanding her coverture, direct or appoint. The deed then proceeded to dispose of the real estate, and the premises in question were conveyed to the said trustees, in trust, for the said Martha Beech until her marriage with John Cummins, and after such marriage, in trust for her sole and separate use; and the deed then contained the following clause: "And after the decease of the said Martha Beech, then in trust to pay the rents, issues, and profits of the said hereditaments and premises unto the said John Cummins and his assigns for and during his life, and from and after the several deceases of the said Martha Beech and John Cummins, to the use of the child and children of the said Martha Beech by the said John Cummins, or other person or persons, and for such estate and estates, interest and interests, ends, intents and purposes, and with, under, and subject to such powers, provisoes and declarations and agreements as the said

¹ 20 Law J. Rep. (N. S.) Exch. 161.

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Martha Beech alone, and notwithstanding her said intended coverture, by any deed or instrument in writing to be sealed and delivered by her in the presence of one or more credible witnesses, or by her last will and testament in writing, or any codicil in writing in the nature of her last will and testament, to be signed and published by her in the presence of one or more credible witnesses, shall direct or appoint."

On the 9th of October, 1820, the marriage took place. On the 26th of October, 1835, Mrs. Cummins made her will, and affected to exercise the power of appointing the premises in question. On the 10th of November, 1835, Mrs. Cummins died, never having had any children. On the 17th of June, 1844, Mr. Cummins, the husband, died. The lessors of the plaintiff claimed as heirs at law to Mrs. Cummins. The defendants were entitled to hold the premises, if Mrs. Cummins had any power of appointing them by her will under the powers of the above deed.

Malins, for the lessors of the plaintiff. The question is, whether the power of appointment reserved by Martha Beech was general, or to be exercised only in favor of her children by her husband John Cummins, or any after-taken husband. The insertion of the words "child or children" is conclusive, for if the power had been intended to be general it would have been "to the use of such persons as she should appoint," which are the words when the 300*l.* navy 5*l.* per cents. are dealt with.

G. Atkinson, contra. Looking at the circumstances and the whole deed, it cannot be supposed Martha Beech intended to deprive herself of the power of dealing with her own freehold property in case she had no children. There is no clause showing that a second marriage was contemplated, and there is no grammatical inaccuracy in reading the power as if the words "to the use of" were repeated before "other persons," just as the personal property is disposed of. Provisions for children by an after-taken husband are not usual.

Malins was not called on to reply.

PARKER, B.¹ The rule is to take the natural and ordinary sense of the words, and in this case the application of that rule is to refer the words "or other person" to the last antecedent, and not to a previous one, unless such construction would lead to a manifest incongruity or absurdity. If then it is so referred, "by" must be inserted, and it becomes a provision for appointing to children by a future husband. The other construction would make the insertion of the words "child or children" quite useless. It may be this was not the meaning of the parties, but rendering the words according to the *prima facie* and plain meaning, it is a power to be exercised only in favor of her children by John Cummins, or other person or persons.

¹ POLLOCK, C. B., was absent.

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ALDERSON, B. The natural reference of the word "other" is to the clause just preceding, and there is a general power given as to the stock which is conferred by apt and proper words, which might well have been used had a general power been intended with respect to the real estate. The word "other," therefore, must be construed to mean children by a future husband.

PLATT, B. I am of the same opinion. If a general power was intended, why should not the limitation have been "to the use of such person or persons," without any mention of children?

Judgment for the plaintiff.

KERBY v. HARDING & BIGGS.¹

Hilary Vacation, February 12, 1851.

Distress — Notice of — Abandonment of.

A notice of distress stated "that by virtue of an authority to me given, &c., I have seized the goods, chattels, and effects specified in the schedule hereunto annexed for the sum of 170*l.* due," &c. The schedule specified certain goods, and concluded thus: "And all other goods, chattels, and effects that may be found in and about the said premises, that may be required in order to satisfy the above rent, together with the expenses:"—

Held, that this notice did not justify the seizure of any goods besides those specified in the schedule.

A distrained for rent due from his tenant B, a livery stable-keeper, and took a pony and carriage belonging to one of B's customers. While the broker was in possession, the owner, who was ignorant of the distress, was allowed to take his pony and carriage out as usual, the broker believing that he would bring them back:—

Held, that this was not an abandonment of the distress, and the owner having brought them back, they were still subject to the distress.

CASE. The first count stated, that before, &c., one J. Woods was tenant of certain premises belonging to the defendant, J. Biggs; that the plaintiff had divers goods and chattels, to wit, a pony, a carriage, and a set of harness, and that the defendants, contriving and intending to injure the plaintiff, heretofore, to wit, &c., distrained for alleged arrears of rent due from the said J. Woods to the defendant, J. Biggs, the said goods and chattels then on the premises exceeding in value the amount of the alleged arrears of rent, and the costs and expenses of the distress, and thereby took an excessive distress. Averment, that the other goods were of greater value than the alleged arrears of rent, costs and expenses, and that the said goods and chattels of the plaintiff were sold by the defendants under the distress. The second count was for seizing divers goods and chattels of the plaintiff on the premises of J. Woods, for rent due from J. Woods to the defendant, J. Biggs, and selling the same without giving notice of the said distress and the cause of the same to the plaintiff or the said J. Woods, or

¹ 20 Law J. Rep. (N. S.) Exch. 163.

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leaving such notice at the chief mansion-house or other next notorious place on the said premises, according to the statute. The third count was in trover.

The defendants pleaded not guilty by statute. Issue thereon.

At the trial, before Parke, B., at Guildhall, at the sittings after Trinity term, it appeared that J. Woods was a tenant to the defendant J. Biggs of certain premises in South Place, Finsbury, where he carried on the business of a livery stable-keeper, and that the plaintiff had a pony and carriage on the premises at the time of the distress. The broker came in upon the 23d of July, but the business was not interfered with until the 25th. Several persons who had horses and carriages standing at livery upon the premises were allowed to take them out for use, promising to bring them back. The plaintiff took his out daily until the 28th of July. On the 26th of July the broker told the hostler that the plaintiff might have his pony and carriage, adding, "He will bring it back again, I dare say." The plaintiff was not informed of the distress until the 28th of July. The first count was abandoned by the counsel for the plaintiff, but it was contended that the notice of distress was bad.

This notice was as follows:—

"Rent, 170*l.*; Possession money, 6*l.* 15*s.*

"Mr. John Woods, or to whom else it may concern.

"Take notice that by virtue of an authority to me given, I have this day seized and distrained the several goods, chattels and effects specified in the schedule or inventory hereunder written, for the sum of 170*l.*, so much being due and owing for four quarters' rent, due at Midsummer day last past to Jeremiah Biggs, for the messuage or tenement and premises situate and being in South Place, Finsbury, in the parish of St. Stephen, Coleman Street, in the city of London; and unless you pay, or cause to be paid, the above sum, together with all costs, charges, or expenses attending this distress, or replevy the same within five days from the date hereof, they will be appraised and sold according to law.

"July 23, 1849. 170*l.*

(Signed) "R. Harding, auctioneer and valuer, 25 New Broad Street, City.

"Schedule or inventory to which the above notice refers, viz., double break, single ditto, black horse, two roan horses, two black horses, chestnut ditto, headed cart, four wheel chaise, and all other goods, chattels and effects on the said premises that may be required in order to satisfy the above rent, together with the expenses."

It was admitted that the plaintiff's goods were not among those particularly specified.

His lordship, upon the authority of *Wakeman v. Lindsey*, 19 Law J. Rep. (N. S.) Q. B. 166, held the notice to be sufficient, and a verdict was found for the defendants on the second count. It was further contended that the plaintiff was entitled to recover upon the count in trover, on the ground that the permission to the plaintiff to take the

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pony and phaeton off the premises amounted to an abandonment of the distress so far as it affected his property. His lordship said the question was whether the defendants by their conduct meant to abandon the distress, and the jury found for the defendants on the third count.

A rule, calling upon the defendants to show cause why there should not be a new trial, was obtained in Michaelmas term, against which

Knowles (J. Brown and Kingdom with him) showed cause.¹ The notice is good, for it plainly means that all the goods which are on the premises are seized, and that so much will be sold as is necessary. It is substantially the same as the notice held good by the Court of Queen's Bench, in *Wakeman v. Lindsay*.

[ALDERSON, B. That decision goes to the extremity of the law, and is not to be enlarged.]

It is sufficient if the notice give such information of the distress as to put the owner upon the inquiry. The statute does not require any particular form. Then there was no abandonment of the goods seized, for there was nothing done to deprive the landlord of the right to treat the tenant as a wrong-doer had he taken away the goods after they had been brought back. *Swann v. The Earl of Falmouth*, 8 B. & C. 456; s. c. 6 Law J. Rep. K. B., 374. There was no intention to abandon, as it was believed that they would be brought back.

Barstow, in support of the rule. The case relied upon at the trial was not then sufficiently examined, but it now appears that the notices differ materially. Besides, the Court of Queen's Bench seem to have had great reluctance in coming to that particular decision, and both Patteson, J. and Erle, J. warned brokers against adopting such general notices. If this notice is now held sufficient, in future it will be universally adopted, for it will be convenient not to specify. Formerly, it was necessary to remove and impound the goods taken, and there must still be distinct information given of what are seized. Then, as to the abandonment, the question is not the intention, but the act. Could not the plaintiff have sold the pony and carriage while they were in his possession off the premises? He cited *Williams v. Price*, 3 B. & Ad. 695; s. c. 1 Law J. Rep. (N. S.) K. B. 258, and *Bayliss v. Fisher*, 7 Bing. 153; s. c. 9 Law J. Rep. (N. S.) C. P. 43.

[Parke, B. It is a sort of permitted pound breach. The question is, if the owner brings them back, whether they are not in the pound under the first taking. We will consider the first point, and intimate whether we will hear the argument concluded on the second.]

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B. His lordship, after stating the pleadings, said: It ap-

¹ December 5, before PARKE, ALDERSON, PLATT, and MARTIN, BB.

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peared that the defendant Biggs was the landlord, and Harding was the bailiff who made the distress on the premises of John Woods, who was a livery stable-keeper, and they took upon that occasion a quantity of horses and carriages that were at the livery stables, and, among the rest, the pony of the plaintiff. Upon the trial the learned counsel for the plaintiff abandoned the count for the excessive distress, but he pressed to recover on the second count in the declaration for selling without giving the proper notice under the statute and upon the count in trover. It appeared also that while the officer was in possession of the articles distrained, he permitted, at the request of the landlord, or by the permission of the landlord, the persons who had horses and carriages at livery occasionally to use them, on the faith that they would bring them back again, without expressing that in terms. The landlord did not wish to injure Woods in his business of livery stable-keeper, and accordingly, on one occasion the plaintiff was permitted to take his pony away; he rode it out and brought it back again afterwards, and left it on the premises. Two points were made for the plaintiff. First, he said the notice of distress that was given was insufficient. *Wakeman v. Lindsay* was cited. That was a notice of distress, beginning in the usual manner, with a schedule containing a variety of different effects, and at the close of it there was a memorandum — “and any other goods, chattels, and effects that may be found in and about the premises.” And upon this case being cited, and without advertng to it more particularly, I held that the notice of distress given in this case was sufficient; but upon looking at the notice of distress given in this case, it appears to be in different terms from the notice of distress in that case to which I have referred. This is a notice beginning in the usual form, “By virtue of authority to me given, I have this day seized and distrained the several goods, chattels, and effects specified in the schedule or inventory hereunder written.” The terms in that case of *Wakeman v. Lindsay* were, “By virtue of an authority to me given by your landlord, take notice I have this day distrained the goods and chattels mentioned in the inventory hereunder written for the sum of 28*l.* 1*s.* 9*d.*, being for arrears of rent due the 29th of September, and unless you pay the said rent and the expenses, or replevy the said goods within five days from the date hereof, they will be appraised and sold,” (then there was an inventory containing the goods specified,) “and any other goods that may be found in and about the said premises, to pay the rent and expenses.” The Court of Queen’s Bench held that notice to be sufficient, and, although with some reluctance, I held this also to be sufficient upon the authority of that case. But, as I observed, the terms of this are different. Here the schedule or inventory follows, in which there are several breaks and horses mentioned, and a chaise is also mentioned, but the horse of the plaintiff is not included in that part of the inventory, and then there comes this conclusion — “and all other goods, chattels, and effects that may be found in and about the said premises that may be required in order to satisfy the above rent, together with the expenses.”

Now, we think, upon consideration, that the terms are too vague,

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and do not point out any certain goods, chattels, or effects, except those which are before enumerated, which are the subject of the distress. The question is, whether that notice is a sufficient notice within the meaning of the stat. 2 Will. & M. sess. 1, c. 5, which enacts, that "where any goods are distrained for rent reserved, and the tenant or owner of the goods distrained shall not, within five days next after such distress taken and notice thereof and cause of such taking left at the chief mansion-house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff, in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may with the sheriff," and so on, "cause the goods and chattels so distrained to be appraised, and after such appraisement to sell."

Now, it has been held the notice required by that statute must be a notice in writing, because it must be left at the chief mansion-house; and it appears to us, the statute requires not merely the cause of taking to be mentioned, but also a notice to be given thereof, that is, of the distress taken, which must include every thing taken. At common law no such notice is necessary, because at common law all that was to be done was for the landlord to go to the premises charged with rent to take the goods, to impound the goods, to convey them to a public pound or private pound, giving notice in the latter case of the place to which they were taken. This statute clearly requires some notice of the taking; and I think the reasonable construction of the statute is, that it should inform the tenant or the person whose goods are taken, by being left at the dwelling-house, and give notice of the goods taken, as well as express what amount of rent is in arrear. This statute, therefore, we think, requires the things to be mentioned that are taken; the general description "any other goods, chattels, and effects on the premises, or in and about the premises," would, according to the decision of the Queen's Bench, be sufficient; but this does not impound all the goods on the premises, but only impounds all the goods, chattels, and effects that may be required in order to satisfy the above rent. It is quite uncertain what are taken, and therefore it appears to us that this notice is an insufficient notice, and that the sale afterwards of any of the articles not included in the inventory itself, *nominatim*, is an illegal sale, and that the defendants are responsible for them.

Then, another objection was taken, which it is hardly necessary to mention, because on this ground there must be a new trial. The second objection, and one much insisted on at the trial, was, that after the plaintiff had been permitted to take his horse away, he brought it back again voluntarily into the custody of the officer who had possession of the distress, and, therefore, there must be a fresh distress in order to entitle the defendant to sell that horse. We are of opinion that my direction in that respect was right. I continue of the same opinion, and I believe my brothers concur in that, that inasmuch as the goods were taken away without any intention whatever to abandon the distress, but with certainty that they would be

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brought back again, that that is not abandoning the distress, and that when they come back again by the voluntary act of the person who takes them away, they are subject to the distress, and therefore, if the case had been confined to that, there would be no new trial; but as, we think, I was wrong in the construction of this notice of distress, it being different from the case in the Queen's Bench, therefore there must be a new trial on that ground.

Rule absolute.

JONES v. HARRISON.¹

Easter Term, April 16, 1851.

County Court — 13 & 14 Vict. c. 61, s. 13 — Costs.

The provision in the 13 & 14 Vict. c. 61, s. 13, that in the cases therein specified "the court or judge may direct that the plaintiff shall recover his costs," is permissive, not imperative.

WARSON, in Hilary term, had obtained a rule to set aside an order made by Martin, B., under the County Court Act, 13 & 14 Vict. c. 61, s. 13, directing that the plaintiff should recover his costs. The action was in contract, the plaintiff and defendant residing more than twenty miles from each other, and the plaintiff recovered a less sum than 20*l*. Under the circumstances, Martin, B., was disinclined to make the order, but did so in consequence of an opinion expressed by Williams, J., that the statute was imperative, and left the judge no discretionary power in such cases.

Bovill showed cause. This rule raises an important question on the construction of the recent County Court Act, 13 & 14 Vict. c. 61, whether when a plaintiff has recovered in a superior court a sum less than 20*l*., in a case where those courts have a concurrent jurisdiction with the county court, the judge is not bound, irrespective of circumstances, to allow him his costs. By the 11th section of that statute it is enacted, "That if in any action commenced after the passing of this act in any of her majesty's superior courts of record, in covenant, debt, detainue, or *assumpsit*, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l*., or if, in any action commenced after the passing of this act in any of her majesty's superior courts of record, in trespass, trover, or case, not being an action for malicious prosecution, &c., the plaintiff shall recover a sum not exceeding 5*l*., the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided, and except in the case of a judgment by default," &c. And then comes the 13th section, "Provided also, and be it enacted, that if in any such action, &c., the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the

¹ 15 Jur. 337. 20 Law J. Rep. (N. S.) Exch. 166.

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satisfaction of a judge at chambers upon summons, that the said action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 128th section of the said recited act of the tenth year of her majesty, or for which no plaint could have been entered in any such county court, or that the said cause was removed from a county court by *certiorari*, then and in any of such cases the court in which the said action is brought, or the said judge at chambers, may thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if this act had not been passed." By the 128th section of the former County Court Act, 9 & 10 Vict. c. 95, a concurrent jurisdiction with the county court is given to the superior courts in three cases: first, where the plaintiff dwells more than twenty miles from the defendant; secondly, where the cause of action did not arise within the jurisdiction of the county court within which the defendant dwelt or carried on his business at the time of the action brought; and thirdly, where an officer of the county court is a party, &c.

[*Parke, B.* The only question is, whether the word "may" in this 13th section is to be understood in the sense of "must." It has been so construed in cases where a public duty is cast on a party.]

Yes, and justice as well as the intention of the legislature require it to be so construed in this section. The plaintiff has a common law right to bring his action, and a statutory right to his costs if he succeeds in it: the 11th section of the present act says that he shall not have them in certain cases, (under one of which the present comes,) "*except in the cases hereinafter provided*"—i. e., the cases excepted by the 13th section. The power vested in the court or judge by this latter section is therefore necessary in order to give effect to a public right, viz., to enable a plaintiff to get his costs in those cases which are excepted from the prohibition in the former section, and must therefore be treated as imperative. The satisfaction of the court or judge, spoken of in the beginning of the 13th section, must be understood solely with reference to the *fact* that the case does come within the provisions of the 128th section of the former act, or that the cause was one for which no plaint could be entered in the county court, or that the cause has been removed from thence by *certiorari*. Suppose a case similar to one which occurred shortly after the passing of the former County Court Act, 9 & 10 Vict. c. 95, where a county court is established in a district, but no judge is appointed for some time. A person living in that district would not be entitled to costs if he were to sue for a small debt in the superior court, and if the opposite side be right, a judge would not be bound to allow him to recover them. If the court or a judge had a discretionary power in allowing these costs, they must receive affidavits to guide their discretion, which would amount to a virtual re-trying of the cause. There are many instances of words in acts of Parliament more discretionary in appearance than the word "may" being construed in an obligatory sense; as where commissioners are empowered to make rates and repay loans. The 13 & 14 Car. 2, c. 12, s. 18.

enacts, that the constables together with the church-wardens and overseers of the poor and other inhabitants of a parish "shall have power and authority" to make rates to reimburse constables who have been put to expense in relieving and conveying rogues and vagabonds to confinement; and in *R. v. Barlow*, 1 Salk. 608, this clause was held to be compulsory.

[*Pollock*, C. B. The stat. 7 Will. 4, & 1 Vict. c. 85, s. 11, enacts, that it shall be lawful for the jury in certain cases of felony to acquit of the felony and convict of an assault; and in the recent case of *Reg. v. Bird*, 2 English Reports 439, it was considered that the jury are actually charged with the assault as part of the matter to be inquired into, and must decide upon it one way or the other. There are several cases in the books, and that you have just cited is one of them, which were decided on a supposed analogy to the 23 Hen. 6, c. 9, which empowers the sheriff to take bail, and has always been construed as imperative. But they all proceed on a mistake, which has likewise found its way into most of the text books; for in a case which I once argued in the Queen's Bench, the Parliament roll of that year was looked for, and the words found to be, not that the sheriff "may," but that he "shall" take bail. The case in Salkeld may perhaps be supported in this way, that the 13 & 14 Car. 2, c. 12, was not the first piece of legislation on the subject. Previous statutes had imposed an obligation on certain parties, and that act was passed to supply what was a manifest defect in them.]

In the present case, also, there was previous legislation. But the decision in *R. v. Barlow* does not rest exclusively on the analogy to the 23 Hen. 6, for the court expressly says, that "where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as 'shall.'" The 8 & 9 Will. 3, c. 11, s. 8, enacts, that in actions on bonds or on any penal sum for non-performance of covenants, &c., "the plaintiff may assign as many breaches as he shall think fit;" and this statute has been held compulsory; *Roles v. Rosewell*, 5 T. R. 538; *Hardy v. Bern*, Id. 636.

[*Parke*, B. It was the greatest mistake to suppose that the word "may" in that statute was used in any other than its natural sense of permissive; and so I have heard Littledale, J., point out many times. In an action of covenant, the plaintiff must always have assigned some breach, or he could not have recovered at all, and that statute merely says that he may, if he please, assign more than one breach; and if he does not, he can only get his damages.]

In *Crisp v. Bunbury*, 8 Bing. 399, Tindal, C. J., says, "Where the object and intent of the statute manifestly requires it, words that appear to be *permissive* only shall be construed as *obligatory*," and he refers to several cases.

[*Parke*, B. A great number of those cases are collected in the 19 L. J., Q. B., 181.]

Watson, contra. It is a rule that all statutes are to be construed according to the ordinary acceptation of the terms used, unless we can see that the legislature meant otherwise. It is certain that the

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word "may," both in its legal and common acceptation, is permissive; and although in some cases the courts have construed it as synonymous with "must," it would be dangerous to do so unless where such clearly appears to have been the intention of the legislature. Now, not only does no such intention appear in the present case, but the adopting such a construction would lead to great mischief; for parties would indorse bills of exchange and promissory notes to persons living at a distance in order that they might put them in suit in the superior courts, and so get costs which ought to have been saved by suing in the county court. [He was then stopped.]

POLLOCK, C. B. The rule which has been so often referred to in this court is the correct one, namely, that statutes are to be construed according to the plain, obvious meaning of the language used. In the present case, it is provided by the section before us, that if certain matters shall be made appear to the satisfaction of the court in which certain actions are brought, or of a judge at chambers upon summons, then that court or judge "may thereupon by rule or order direct that the plaintiff shall recover his costs;" and the question turns on what is the meaning of the word "may" in this section. Does it mean that the court or judge shall have power either to do the act spoken of or abstain from doing it, as they see fit, or that they *shall* do it whether they consider it fit or not? I think if it were intended that the result of the court or judge being satisfied of these matters should be that the plaintiff was to have his costs in all such cases, the legislature would not have directed the then unnecessary proof of a rule of court or judge's order to be gone through, and would have said, if the court or judge is so satisfied, the plaintiff "shall" have them. I own I cannot say that there is no force whatever in the argument of Mr. Bovill, that "may" ought to receive the same construction with reference to all the members of the sentence, — I can conceive a case in which I should feel compelled to yield to that argument, — but with reference to the matter before us it ought not to prevail, and I should rather say that "may" was here meant by the legislature to signify what it ordinarily does mean, i. e., it shall be in the power of the judge or the court to do the specified act or not to do it, according to his discretion and the view he may take of the circumstances; and the moment you can put a case coming within the language of this section, in which it would probably be the duty of the court or judge to decide against allowing the plaintiff's costs, it seems to me that the great strength of Mr. Bovill's argument vanishes. Now, to say nothing of actions for criminal conversation, libel, slander, and the others, the costs of which are exempted by the 11th section, there are some actions where they might very properly exercise such a discretion, where, though the action might be brought in one court or the other, they might say, "This *ought* to have been brought in the county court, and if you, the plaintiff, were acting in a fair spirit to obtain a decision on your rights, you would have proceeded there, and not in the superior court." It is enough to say that "may" here has the meaning it has in ordinary discourse, and this rule must therefore be made absolute.

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PARKE, B. I am of the same opinion. The rule which the courts have constantly adopted of late years in construing acts of Parliament or other instruments, is to take the words in their usual grammatical sense, unless that would be obviously repugnant to the intention of the framers of the instrument, to be collected from the other parts of it, or would lead to some other inconvenience or absurdity. Now the term "may," in its ordinary construction, is *permissive*, and Mr. Bovill's ingenious argument has only led my mind to doubt a little, but not rendered it clear to me that the legislature in this section did not use it in its ordinary sense. I think we ought to abide by that rule of construction; and so doing, I cannot see any satisfactory reason why the word "may" here should not be so read. No doubt, in most of the cases which come before them, the court or judge would think it right to exercise their discretion in allowing or disallowing a plaintiff's costs, and I am not sure the legislature did not mean them to have such a discretion.

MARTIN, B. The rule referred to by my brother Parke is laid down in 2 M. & W. 195, thus, "It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further." Now there can be no doubt in the world that Mr. Watson is right in saying that the word "may" is, in its grammatical construction and ordinary understanding, *permissive*; and so far is the putting that meaning on it here from being repugnant to the intention of the legislature, that it carries out their intention. I have always understood that in these statutes the legislature wished to discountenance the bringing actions in the superior courts for a less sum than 20*l.* and 5*l.* respectively, because unfortunately the costs in such proved a loss to every one except the professional persons concerned in them. The legislature therefore said that wherever there is a concurrent jurisdiction in the superior courts, of which a plaintiff may avail himself to recover a debt under 20*l.* or 5*l.*, as the case may be, we will not absolutely deprive him of his costs, but he may go before the court or a judge, who shall have power, according to the circumstances, to take the case out of the ordinary rule, which ought to be to allow no costs if the amount recovered be less than that specified in the statute. In a case like that put by Mr. Bovill, where no action *could* be brought in a county court, the judge would in his discretion say that a man shall have his costs. But in many cases it would be quite otherwise. One came before me the other day. A man lived in Staffordshire, within half a mile of a district where there was a county court in which he might have sued; he might also have recovered his debt in the superior courts, but it was monstrous that he should not step over the boundary and recover it in the county court. I think that Mr. Watson's construction of this section is right. I thought so when the case was before me at

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chambers, but was unwilling to refuse an order in consequence of the opinion of my brother Williams, and I acceded entirely in deference to his judgment, and with the desire that the point should be brought before the court. I am satisfied that my order was wrong, and that this rule ought to be absolute.

Rule absolute.

WAGNER v. IMBRIE.¹

Easter Term, May 3, 1851.

Plea Puis Darrein Continuance.

In an action on a recognizance of bail, the defendant pleaded two pleas of *nul tiel* record and a plea of payment. The plaintiff having obtained judgment on the pleas of *nul tiel* record, the issue on the plea of payment came on for trial, when the defendant offered a plea *puis darrein continuance*:—

Held, that such a plea was receivable, notwithstanding the judgment against the defendant on the other issues.

THIS was an action on a recognizance of bail entered into by the defendant for one H. A. The defendant pleaded, first, no record of such recognizance; secondly, no writ of *ca. sa.* against H. A.; thirdly, payment by H. A. The plaintiff having obtained judgment on the pleas of *nul tiel* record, the issue on the plea of payment came on for trial before Martin, B., when the defendant offered a plea *puis darrein continuance*, which was received by the judge, and the jury were discharged from trying the issue joined.

Hornby moved to set aside the plea, and for leave to sign final judgment. The plea of *puis darrein continuance* was pleaded too late; the plaintiff having already obtained judgment, the defendant ought to have first moved to set it aside. There is no authority precisely in point; but in *Stoner v. Gibbons*, Moore, 871, where a party offered to plead a plea *puis darrein continuance* after a joinder in demurrer, the court resolved that such a plea could not be received after a demurrer, though it would be otherwise after issue joined. In *Sharpe v. Witham*, 1 M.C. & Y. 350, after issue had been joined on the plea of *nul tiel* record, at the day appointed for the trial the court allowed a plea of bankruptcy *puis darrein continuance* to be pleaded in order to prevent judgment of failure of record being taken; which seems to show that if such judgment had been taken, the plea *puis darrein continuance* would have been too late. In 2 Chit. Arch. Prac. 274, it is laid down that the defendant may at any time before verdict or judgment withdraw his plea; but it is not said whether this means final judgment.

PARKE, B. I see no objection on principle to the defendant's pleading this plea. The case which has been cited from Moore's Reports

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only decides that where you have a demurrer which goes to the whole cause of action, you cannot waive the demurrer and plead *puis darrein* continuance, but must stand on the validity of the declaration in point of law.

Where a defendant pleads a plea *puis darrein* continuance he waives all former pleas, the reason for which is that otherwise he would be pleading double; and the practice on this subject was formed previous to the statute of Anne, which, although it permits a defendant to plead several pleas, does not extend to allowing the introduction of a fresh one at a subsequent stage of the cause. But when, as here, there is a plea which remains to be tried, I see no reason why the defendant may not, if he please, withdraw it and plead *puis darrein* continuance; for this is no waiver of any thing else on the record. What was done in this case was therefore quite regular, and no rule ought to be granted.

MARTIN, B. The defendant is entitled to the benefit of the defence contained in this plea; and he must avail himself of it either by plea *puis darrein* continuance or *audita querela*. As to the suggestion about setting aside the judgment, the judgment ought not to be set aside, for it is quite regular.

The rest of the court concurring.

Rule refused.

SOLAMAN v. COHEN.¹

Easter Term, April 15, 1851.

Commission to examine Witnesses.

Under the 1 Will. 4, c. 22, the court or a judge has power to issue a commission to a British colony for the examination of witnesses on interrogatories.

AN application was made on the part of the defendants in this case, to Wightman, J., at chambers, for a writ in the nature of a *mandamus* or commission to examine witnesses in Barbadoes and Gibraltar; who made an order for a commission to examine on interrogatories, but refused it to examine *viva voce*.

Lush moved for a rule to issue it in the latter form, and if necessary, alter the judge's order accordingly. The court or judge has no jurisdiction in cases like the present to order a commission to examine witnesses on interrogatories. The question depends on the two statutes 13 Geo. 3, c. 63, and 1 Will. 4, c. 22. The former relates solely to India, and its 40th section enacts that in all indictments or informations in the Queen's Bench for misdemeanors committed in India, that court may award a *mandamus* to the courts in India, to hold a court for the examination of witnesses, *viva voce* in open court,

¹ 15 Jur. 362.

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upon oath. By the 42d section, in certain proceedings in Parliament, the lord chancellor or speaker of the House of Commons may issue a warrant to the governor general of India, and to the judges there for the examination of witnesses; and by the 44th section, in an action brought in the courts at Westminster, for which the cause of action has arisen in India, the court is empowered "to award such writ or writs, in the nature of a *mandamus* or commission as aforesaid," to the courts in India, as the case may require, for the examination of witnesses. By the 1 Will. 4, c. 22, s. 1, all the powers, authorities, provisions, and matters contained in the former act relating to the examination of witnesses in India are extended "to all colonies, islands, plantations, and places under the dominion of his majesty in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of his majesty's courts of law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the judge whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission, &c., will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for." The power of the court or judge to issue a *mandamus* or commission for the examination of witnesses in British colonies rests altogether on this latter statute.

[*Martin, B.* But the 4th section enacts that it shall be lawful for the courts at Westminster, in every action there depending, to order the examination on oath, on interrogatories or otherwise, before the master or prothonotary, or other person or persons to be named, &c., of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath, at any place out of their jurisdiction, *by interrogatories or otherwise*, and to give all such directions touching the time, place, and manner of such examination as may appear reasonable and just.]

That section must be read in connection with the 1st, and their joint effect is to authorize the examination on interrogatories in the queen's dominions or foreign countries, but not in British colonies.

PER CURIAM. There is nothing in this statute to limit the discretion of the court or judge relative to ordering the evidence of witnesses to be taken *viva voce* or on interrogatories. And there are good reasons why this should be so; for in many cases it would be more convenient to witnesses to be examined where they reside than brought to the court to which the process must be directed, and might be at a considerable distance from them. If, however, you can satisfy us that under the circumstances of this case a *viva voce* examination would be more advisable than an examination on interrogatories, we will grant you a rule.

Lush then went into the facts, and obtained a rule.

MUIRHEAD v. EVANS.¹

Easter Term, April 28, 1851.

Practice — Too many Jurors.

At the trial of a cause by a special jury, it having been discovered during the examination of the first witness that there were thirteen jurors in the box, the judge offered to dismiss one, but the defendant's counsel refusing to consent, and it being impossible to ascertain which of the jurors was sworn last, he discharged the jury, directed the special jurymen to be called over again, and tried the cause by the first twelve that answered:—

Held regular.

Quere, whether if it could have been ascertained which of the thirteen men in the box was the superfluous juror, the proper course would not have been to turn him out of the box and let the trial proceed.

THIS cause came on for trial before Williams, J., and a special jury. After the plaintiff's case had been opened, and while the first witness was being examined, it was discovered that there were thirteen jurymen in the box. The plaintiff's counsel offered to consent to one being withdrawn, but this proposal was refused by the other side, and it being impossible to ascertain which of the jurors was sworn last, the judge adjourned the cause till the next morning; when, the defendant persisting in his refusal, he discharged the jury, directed the special jurors to be called over again, and tried the cause by the first twelve that answered. The defendant's counsel protested against this course, and retired from the cause, which was then tried as undefended, and a verdict returned for the plaintiff.

T. Allen moved for a new trial. The judge at *nisi prius* had no authority to discharge the jury unless by consent of both parties; and as there is no error apparent on the record, if the court do not grant a new trial the defendant will be without remedy. If the objection taken in this case had been taken after verdict, it might be different, but where an error in the proceedings is discovered during the progress of a trial, and either party stands on his right, the judge has no alternative but to postpone the cause. The Jury Act, 6 Geo. 4, c. 50, s. 26, after pointing out the mode in which the names of persons are to be drawn to serve on a common jury, says, "The twelve men so first drawn and appearing and approved as indifferent, &c., being sworn, shall be the jury to try the issue;" and the same principle applies where a cause is tried by a special jury. Now here it does not appear whether the cause was tried by the first twelve of the men who were sworn on the first day.

[*Parke, B.* Neither does the contrary appear, and it is for you to satisfy us of that. If the judge were to postpone the cause as you suggest, he would not execute the writ of *nisi prius*.]

In *Norman v. Beaumont*, Willes, 484, a new trial was granted on the ground that one of the jurors by whom the cause was tried was not in the *nisi prius* panel, but had personated a man who was.

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In *Dovey v. Hobson*, 6 Taunt. 460, after the case had been gone through it appeared that one of the jurymen had not been summoned, but was sworn in the name of a person to whose house he had succeeded, and who had been summoned; the plaintiff refused to consent to the jury being discharged, and he having obtained a verdict, the court awarded a *venire de novo*. In *Carne v. Nicoll*, 3 Dowl. 115, which was a writ of right, the four knights were sworn and elected the grand assize; but on the day of trial one of the knights not appearing, it was held that the trial could not proceed except by consent. In *Doe d. Lord Ashburnham v. Michael*, 16 Law T. 485, where an action came on to be tried before a special jury, a man whose name was not in the panel answered by mistake for one of the special jurors. The mistake having been discovered when the jury were about to give their verdict, the judge offered to try the cause over again before the proper jury, but the plaintiff claimed to have the verdict taken, the defendant protesting against it, and the jury having found for the plaintiff, the Court of Queen's Bench held it a mistrial, and issued a *venire de novo*.

POLLOCK, C. B. There ought to be no rule. It appears to me that there would clearly have been an irregularity in going on with the first trial unless by consent; and the objection having been taken before verdict would have rendered the proceedings null and void, so that there must have been a new trial. It appears to me that when proceedings turn out to be null and void, one mode is to treat them as such and begin all over again. I doubted, indeed, whether under the circumstances of this case the proper course might not have been to turn the thirteenth jurymen out of the box, and try the case with the others; but as it was impossible to discover who that person was, the only remaining course that could be taken was that which was taken, i. e., to consider all done as if it had not been done — to treat it all as null and void. It was the duty of the judge to obey the writ of *nisi prius*, otherwise he would not discharge the duty imposed on him; it was the duty of the jurors who had been summoned to continue to attend the court, and it appears that the next morning twelve of them were sworn and the cause tried. If there was any thing wrong in that, Mr. Allen may bring his writ of error; but whether it will lie or not, I think we ought not to interfere.

PARKE, B. The moment an error is discovered it is the duty of the judge to rectify it immediately, and not suffer the cause to go on. Here, when it was discovered that there were thirteen jurors in the box, the proper course was to see which were the first twelve sworn, and who, I agree with Mr. Allen, were the proper persons to try the cause. But it being impossible, as I understand, to ascertain the fact as to which of the thirteen was the superfluous jurymen, the judge had no alternative but either to suffer the cause to go on, with the certainty that it was all useless, as every thing done would be set aside by the court, or dismiss the jury and let the cause be tried over again. The last course was taken, and I think rightly. I agree that

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if it could be clearly ascertained who the thirteenth juror was, the proper course would have been to turn him out of the box, and let the trial proceed with the remaining twelve.

PLATT and MARTIN, BB., concurred.

Allen. It would be hard if we were to be concluded by this verdict; for on a former trial of this cause by a common jury, the defendant obtained a verdict, and we have now an affidavit of merits.

PLATT, B. You brought the hardship on yourself by the course you took at the trial.

Rule refused.

BREESE v. OWENS.¹

Easter Term, May 9, 1851.

Writ of Trial — Court of Record — County Court.

Quere, whether a writ of trial under the 3 & 4 Will. 4, c. 42, s. 17, can be sent to the judge of a county court held under the 9 & 10 Vict. c. 95: but

A judge's order directing such a writ to be issued to the judge of the county court and to be returned by the sheriff, is bad.

THIS being an action brought to recover a sum not exceeding 20*l.*, an order was made by Wightman, J., for a writ of trial under the 3 & 4 Will. 4, c. 42, s. 17. The order directed that the cause be tried by the judge of a certain county court held under the 9 & 10 Vict. c. 95, but concluded in the form of an order for a writ of trial directed to a sheriff, namely, "that the said sheriff return such writ," &c. The writ was issued directed to the judge of the county court, and commanded him to return it, who tried the cause, assisted by a jury of twelve men. The defendant appeared by attorney at the trial; when a verdict having been found for the plaintiff, —

J. Thompson, on a former day in this term, obtained a rule to set aside the judge's order and all subsequent proceedings, on these grounds: first, that a writ of trial under the 3 & 4 Will. 4, c. 42, s. 17, could not be sent to the judge of a county court under the 9 & 10 Vict. c. 95; secondly, that at all events the judge's order was bad for directing *the sheriff* to return the writ.

Bramwell showed cause. The questions in this case arise on the 17th section of the stat. 3 & 4 Will. 4, c. 42, which enacts, that "in any action depending in any of the superior courts for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed 20*l.*, it shall be lawful for the

¹ 15 Jur. 431.

court in which such suit shall be depending, or any judge of any of the said courts, if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county, and for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues, by a jury to be summoned by him, and to return such writ with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues." It has been held that a writ of trial under this section may be directed to the judge of any inferior court of record; *Clark v. Marner*, 2 Dowl. 774; and the first point is, whether the judge of a county court under the 9 & 10 Vict. c. 95, comes within its words. The 3d section of the County Court Act, 9 & 10 Vict. c. 95, expressly enacts, that "every court holden under this act shall be a court of record;" and writs of trial are in practice frequently issued to these courts.

[*Alderson, B.* I have made several orders for such writs.]

The other side will probably rely on the observations of this court in *Farmer v. Mountfort*, 8 M. & W. 266; 9 Id. 100, which, however, when rightly understood, only mean that the judge of an inferior court to whom a writ of trial is directed must summon the jury from the persons living within his jurisdiction; and although causes arising in the county courts are tried by a jury of only five, yet when the judge of one of those courts acts under a writ of trial, there must be the regular jury of twelve; for he is not then acting as judge of the county court, but under the special directions of the 3 & 4 Will. 4, c. 42. Secondly, the direction that the *sheriff* return the writ does not render the writ null and void, but is at most an irregularity, which was waived by the defendant's attending the trial without objecting to it. If the court entertain any doubt in this case they ought not to interfere on motion, as the objections taken appear on the record, and should leave the defendant to his writ of error. In *Walker v. Needham*, 1 Dowl., N. S., 220, which was a motion to set aside a writ of trial, Tindal, C. J., says, "This is in substance and effect a motion to arrest the judgment in this case; and I do not think that we should be called upon, on motion, to arrest the judgment where the case is one of nicety and difficulty, and appears on the record. Still less should we be so called on, on the ground that the writ was improperly issued to the sheriff, when it appears that the party who now complains was instrumental to the case going before the sheriff, by giving his consent to the writ being issued."

Lush and *J. Thompson*, in support of the rule. At the time of the passing of the 3 & 4 Will. 4, c. 42, there were in existence various courts of record acting according to the rules of the common law. There were likewise numerous courts of requests presided over by

lay commissioners; and the statute, in providing for the issuing of writs of trial, had only in contemplation the former of these, and perhaps any others of the same description which might afterwards be created. Now the county court, as remodelled by the 9 & 10 Vict. c. 95, does not come under that class, for it is only a substitution of new judges for those of the old courts of requests. This appears from the 5th section, whereby many courts of request are merged in the county courts; and it is doubtful if its judgments are removable into the superior courts under the 1 & 2 Vict. c. 110, s. 22. Although the 9 and 10 Vict. c. 95, makes the county courts courts of record, they do not keep records of their proceedings as the superior courts do. So the Bankrupt Acts constitute the Court of Bankruptcy a court of record, but it will scarcely be contended that writs of trial could be sent to them.

[*Parke, B.* The Court of Bankruptcy is not a court of record for the recovery of debt.]

The 3 & 4 Will. 4, c. 42, never intended to give a judge power to summon a jury who had none before, and who has no means of enforcing his summons. In *Farmer v. Mountfort*, 9 M. & W. 100, already cited, Lord Abinger, C. B., says, "It appears to me that the right construction of the statute is, that the inferior judge to whom a writ of trial is directed shall summon for the trial such a jury as by law and usage he is entitled to summon." And *Parke, B.*, says, "It seems to me that the meaning of the act is, that writs of trial shall be tried by the inferior judge in the same manner as causes arising in his own court; that is, by the jury he is empowered to summon for that purpose."

[*Alderson, B.* The old maxim of the law is, "Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud." If, therefore, the statute meant to command the county court to try the cause in the regular way, they must have power to summon twelve men to try it.]

Then from what class of persons are the jurors to be taken? If it be said, from the persons qualified to act as jurors in the county, the answer is, that by the Jury Act, 6 Geo. 4, c. 50, s. 50, the juries in liberties, cities, and boroughs are to be taken as they were before the passing of that act, and the qualifications of these vary in different places. [*Bramwell* referred to the 72d section of the 9 & 10 Vict. c. 95.] Besides, in county courts the parties to the suit may be examined; so that if writs of trial like the present could be issued, a party might have his case tried with all the irregularities of those tribunals, and afterwards have his costs taxed in the superior court; for under the 9 & 10 Vict. c. 95, the decision of the county court is final and without appeal. Again: the 128th section of that act gives an option to the plaintiff in certain cases to sue either in the superior court or the county court—a provision which would be neutralized if, after he had commenced his action in the superior court, it could be transferred to the county court by means of a writ of trial. Secondly, the directing the sheriff to return the *postea* of a cause tried by a tribunal with which he had nothing to do, is clearly bad. If the

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court think our arguments well founded they ought to discharge this rule, and not put the parties to the expense of a writ of error.

POLLOCK, C. B. The argument of Mr. Lush and Mr. Thompson has much abated the confidence with which I should have looked forward to the termination of a writ of error in this case. Before hearing that argument, I thought it tolerably clear that the judge of a county court was the judge of a court of record within the meaning of the Writ of Trial Act. We may know what was the object of the legislature in making the judges of county courts under the 9 & 10 Vict. c. 95, judges of courts of record, and why the clause to that effect was put into that statute. Perhaps we may know (perhaps I should rather say we may have strong reason to suspect) that the legislature intended they should be made such in as full and ample a manner as the judges of the superior courts at Westminster; and if there is a clause in a statute which directs that all judges of courts of record shall have such and such powers, then when a person is made judge of a court of record, it seems to me that he becomes for all purposes a judge of a court of record, and it would be an exceedingly dangerous refinement to hark back to the period when the particular matter was enacted, and say that it was only meant to apply to such judges as were judges of courts of record at that time. Then it is argued that the legislature, in enacting that writs like these are to be directed to the judges of courts of record, meant such as acted according to the course of the common law, whether then existing or subsequently created by statute. I do not however think that is so, at least it is so doubtful that we ought not to act on it. Still the argument of Mr. Lush and Mr. Thompson has abated, as I have already said, my confidence on the matter, and its effect on two members of the court has been to satisfy them that county courts are not meant by this clause in the 3 & 4 Will. 4, and do not come within it by being erected as they are into courts of record by the 9 & 10 Vict. We will therefore discharge the present rule, and let the matter be determined by a court of error. The inclination of my opinion is, that county courts are courts of record within the 3 & 4 Will. 4, and I think it would be the best decision to come to on the subject, for of all the courts of record to which a writ of trial could be sent with advantage, the county court judges would be among the best; and if that be not the present state of the law, it would be advisable, I think, to make it so. This rule will therefore be discharged, but without costs.

PARKE, B. I am not prepared to say that my mind is made up on the principal point in this case; certainly the effect on me of the argument of Mr. Lush and Mr. Thompson has been, to produce a strong inclination of opinion that the judge of a county court is not a judge of a court of record, within the 17th section of the 3 & 4 Will. 4, c. 42. At the time that act was passed, the courts of record for the recovery of small debts were courts which proceeded according to the course of the common law; at least I think so; in which questions were determined by a jury, the rules of the common law as to

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evidence and in other respects being followed; and the statute of Will. 4 would only operate on courts of record of that description, not indeed solely on those existing at the time when it was passed, but on others of the same nature created afterwards — according to the known rule of law, that the crown may create courts of common law, but not courts of equity or courts of requests. The only question therefore is, if this new kind of court of record intended by the County Court Act is a court of record within those terms. No doubt in the County Court Act these courts are made courts of record, i. e., they are to have judges with the privilege of judges of record; although not perhaps for all purposes, for it was probably not intended they should register their acts in the same way. But the court thus created is a court of record which summons a jury of only five persons, and proceeds by rules of evidence different from those of the common law, and, among other things, examines the parties to a suit. My present impression, though I do not say that I shall finally come to that conclusion, is, that the proper construction of the statute of Will. 4 is to confine its operation to courts of record *ejusdem generis* with those existing at the time that act was passed; and as the whole matter appears on the record, I should propose that judgment be arrested and the burden of bringing a writ of error thrown on the plaintiff. My lord chief baron and my brother Alderson think otherwise, and that the writ of error ought to be brought by the defendant. The rule will therefore be discharged, but no costs can be given, as all the court are of opinion that the order of my brother Wightman is clearly bad as to the latter part which directs the *sheriff* to return the writ.

ALDERSON, B. I think the judge of a county court is judge of a court of record within the section in question. The words of it are, that the trial may take place "before the sheriff of the county where the action is brought, or before any judge of *any court of record* for the recovery of debts in such county." It is extremely desirable to adopt this construction; for you could not have better persons to try these causes than the judges of the new county courts. Then however, it is said those courts do not proceed according to the rules of the common law; but, if my construction of this act be correct, the judge of the county court who tries a cause under a writ of trial must try it by the rules of the common law, for he must summon a jury. By the 18th section of the 3 & 4 Will. 4, the judge to whom a writ of trial is directed has all the powers of a judge of *nisi prius*, and a new trial will be granted if a judge at *nisi prius* does not act according to the common law; consequently, the judge of a county court in such a case must not examine the parties, and if he were to do so, I would grant a new trial.

PLATT, B. The distinction taken by my brother Parke is the correct distinction, namely, that the courts of record contemplated by the 3 & 4 Will. 4, c. 42, are such as proceed according to the course of the common law. It is not because a subsequent statute constitutes a court a court of record for some particular purposes that it must necessarily

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come within the scope of that enactment; and I think, therefore, that the judge of a county court is not the judge of a court of record within the 3 & 4 Will. 4, c. 42. If this construction is not to prevail, I really do not see where we are to stop. Certainly the words of the act, that the court to which a writ of trial issues must be one "for the recovery of debt," may exclude the judges of the Court of Bankruptcy; but still when we look at a statute of this kind, we must not follow the exact letter; we must take it altogether, and see for what purpose the court in question is made a court of record. When therefore we look at the present act with that view, and see what sort of courts existed at the time it was passed, there ought to be some strong argument to show that the provisions of a statute which creates the county courts courts of record for some particular purposes came within the view of a legislature which never contemplated the County Court Act at all. Still, I do not mean to say that the matter is free from doubt; I only say that I think Mr. Lush and Mr. Thompson are right, and that this rule should be discharged, but without costs.

PARKE, B. I by no means disagree with my brother Alderson, that if this is a court to which a writ of trial may go, the judge in trying the cause under the writ must follow the rules of the common law. My argument was, that the statute was not meant to apply to any court where the issuing of the writ would oblige the judge to adopt a course different from that of his court.

Rule discharged, without costs.

CRAWFURD v. COCKS & others.¹

Hilary Vacation, February 11, 1851.

Amendment of Declaration after Trial — Statute of Limitations.

The plaintiff, a customer of a banking firm, having brought an action against the firm, was nonsuited, on the ground of two of the defendants' not being members of the firm at the time of the accruing of the cause of action. Negotiations on the subject of the action had been going on for several years, during which the defendants had not questioned their liability to be sued, and in a bill in equity filed by them against the plaintiff after pleading, and before trial, had stated that the liabilities of the previous firm had been transferred to themselves, and further stated who the members of the firm were when the cause of action accrued.

The court, to prevent the operation of the statute of limitations, set aside the nonsuit, and gave the plaintiff leave to amend the declaration by striking out the two defendants who had been erroneously included in the action.

ASSUMPSIT for money lent, money had and received, interest, and upon an account stated, brought by the plaintiff against T. S. Cocks the elder, R. Biddulph, T. S. Cocks the younger, and O. Biddulph.

¹ 20 Law J. Rep. (N. S.) Exch. 169.

Pleas — First, *non assumpsit*; second, payment; third, set-off; fourth, Statute of Limitations.

The cause was tried before Pollock, C. B., at the Middlesex sittings after last Michaelmas term, when the following facts appeared: Previously to 1838, the plaintiff had two accounts with the firm of Cocks, Biddulph, & R. Baskins, one as the executor of the will of James Crawford, which had been opened in 1816, and one in his private capacity; and the action was brought to recover 534*l.*, the balance of the former account. In 1839 and 1840, payments to that amount had been made by the firm by the direction of one Corfield, who was acting as the plaintiff's solicitor for certain purposes; and the point in dispute was, whether such payments had been made by the plaintiff's authority. At that time the firm consisted of the defendants T. S. Cocks the elder and R. Biddulph, and of John Biddulph, who died in 1845. In January, 1841, the defendants T. S. Cocks the younger and O. Biddulph became partners in the bank; and on that occasion the balance on the executorship account, as it appeared in the books of the old firm, after debiting the plaintiff with the payments in question, was carried to the account of the new firm. The plaintiff in and for several years prior to 1839 resided at Florence, where, with the exception of short visits to this country, he remained until 1846. The plaintiff heard of the payments in question for the first time in 1841, but did not ascertain upon what grounds they had been made until December, 1843, when he applied through his attorney to the banking firm, which then consisted of the four defendants, and John Biddulph, for a return of the money. The firm refused to assent to this request, and threatened to sue the plaintiff for the balance owing on his private account, if he took any proceedings against them to enforce the claim. In consequence of this threat, no further steps were taken until December, 1846, when the plaintiff, in the belief that the firm consisted in 1839 and 1840 of the four defendants, and John Biddulph, commenced this action by issuing a writ against the five. This was not served, but was duly continued until September, 1849, when the plaintiff declared against the four defendants. After pleading, they filed a bill of discovery, alleging that since the opening of the executorship account, several changes had taken place in the firm, and that upon each change that account had been, with the plaintiff's assent, transferred from the old to the new firm; that from 1826 to January, 1841, the firm consisted of the defendants T. S. Cocks the elder, R. Biddulph, and J. Biddulph; that T. S. Cocks the younger and O. Biddulph were at the last-mentioned time admitted partners; and that upon the death of John Biddulph, accounts were taken between his representatives and the surviving partners, and that the rights and liabilities of the preceding firms with respect to the said account were, therefore, transferred to and vested in the defendants in equity.

For the defendants, it was contended that the defendants, T. S. Cocks the younger and O. Biddulph, were not liable, and that the plaintiff must consequently be nonsuited. For the plaintiff, it was urged, that there was evidence for the jury that the new firm had

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taken upon itself the liabilities of the old within the principle of *Kirwan v. Kirwan*, 2 Cr. & M. 617; s. c. 3 Law J. Rep. (n. s.) Exch. 187. *Hart v. Alexander*, 2 Mee. & W. 484; s. c. 6 Law J. Rep. (n. s.) Exch. 129. Pollock, C. B., (after consulting the other judges,) thought that the new firm had only taken upon themselves the responsibility for the account as it appeared on their books at the time of the change of firm, and directed a nonsuit.

A rule was obtained calling upon the defendants to show cause why the nonsuit should not be set aside, and why there should not be a new trial, and why the plaintiff should not have liberty to amend the declaration and subsequent proceedings by striking out the names of T. S. Cocks the younger and O. Biddulph.

The affidavits in support of the motion stated, that the action was brought to try the question whether or not the payments in 1839 and 1840 were wrongful; that every endeavor had been made, both before issuing the writ and before declaring, to ascertain who were members of the firm in those years, but that the plaintiff had refrained from making an application to the bank for that purpose partly in consequence of the defendants' threat to take proceedings against him in respect of his private account, and partly from their having avowed a determination to offer every resistance to the claim; that until the filing of the bill in equity, the plaintiff and his advisers believed that all the defendants were partners in 1839 and 1840; and that in consequence of the allegation in the bill that the new firm had taken upon themselves the liabilities of the old, it was not deemed necessary to amend. The plaintiff's attorney also stated that, throughout the whole of the negotiations, it was never suggested that any of the defendants were not members of the firm in 1839 and 1840.

The defendants' affidavits stated, that no intimation that the plaintiff would hold the bankers liable had been given to them till 1843, and that in 1842 Corfield had taken the benefit of the Insolvent Act; and that the plaintiff, in his answer in equity, had expressed his belief as to the correctness of the allegations contained in the bill respecting changes in the firm and the transfer of the accounts.

W. H. Watson and *M. Smith* showed cause, (January 31.) The plaintiff has been guilty of laches, and, therefore, is not entitled to the assistance of the court. Although he was aware, in 1841, that the payments in question had been made, yet he made no application to the defendants until 1843, subsequently to the insolvency of Corfield, so that the defendants lost all opportunity of being reimbursed by Corfield. Again, the plaintiff did not take any proceedings until 1846, and then suspended them, without the defendant's knowledge, until 1849. The result is, that the members of the partnership had been changed in the mean time, and the accounts wound up upon the footing of the correctness of the payments to Corfield. The plaintiff has not been taken by surprise; he knew from the bill in equity who were the parties in 1839 and 1840, and might have made an application to amend at that time. This is not a case for ar-

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amendment. The court interposes in those cases only where the Statute of Limitations would be a bar to a fresh action, and the application to amend is made before trial. *Lakin v. Massie*, 2 Cr. & M. 685; s. c. 3 Law J. Rep. (N. S.) Exch. 203. *Goodchild v. Leadham*, 1 Exch. Rep. 706; s. c. 17 Law J. Rep. (N. S.) Exch. 90. That rule, however, has not been acquiesced in by the other courts. *Roberts v. Bate*, 6 Ad. & E. 778.

Sir F. Thesiger and *Honyman*, in support of the rule. The plaintiff was nonsuited on a point quite independent of the merits, and ought, therefore, to have an opportunity of amending his declaration, if he can do so consistently with the rules of practice. An amendment would have been allowed previously to the trial. *Palmer v. Beale*, 9 Dowl. P. C. 529; *Jackson v. Nunn*, 4 Q. B. Rep. 209; and may with propriety be allowed now. The plaintiff submits that he is entitled to amend on payment of costs. *Christie v. Bell*, 16 Mee. & W. 669; s. c. 16 Law J. Rep. (N. S.) Exch. 179. *Goodchild v. Leadham*. In *Bonzi v. Stewart*, 7 Man. & G. 746; s. c. 13 Law J. Rep. (N. S.) C. P. 189, the plaintiff, who had made an error in his replication, was allowed to amend it and have a new trial, although all the facts were known to him at the time of his replying. The plaintiff, in this case, was not aware of the names of the parties until he saw the bill in chancery, and thus he was led to suppose that the defendants had made themselves answerable for the debts of the old partnership. The plaintiff's delay is sufficiently explained by the fact that he was not aware of the nature of the payments to Corfield until the year 1843.

Cur. adv. vult.

PARKE, B.,¹ now said: We have felt considerable doubt respecting this case, but we think, on the whole, that justice requires the rule to be absolute on these terms; that if the defendants shall within three weeks consent to pay the debt sought to be recovered in this action, the plaintiff shall pay all the costs of the cause. But if the defendants object, then, on payment of the costs, the nonsuit is to be set aside and a new trial had, the plaintiff being at liberty to amend the declaration by striking out the names of T. S. Cocks the younger and O. Biddulph, as co-defendants, on payment of all the costs of those defendants and all other costs of and occasioned by the amendment, with liberty for the remaining defendants to plead *de novo*.

Rule absolute accordingly.

¹ The case was argued before POLLOCK, C. B., PARKE, ALDERSON, and MARTIN, BB.

Hinckley v. The Mayor, Aldermen, and Burgesses of Stafford.

HINCKLEY v. THE MAYOR, ALDERMEN, AND BURGESSES OF STAFFORD.¹

Hilary Vacation, February 14, 1851.

Statute, Construction of—34 Geo. 3, c. 97—Order of Justices, Validity of.

The 34 Geo. 3. c. 97, an act for building a new shire hall for the county of Stafford, enacted, sect. 31, that when the said shire hall should be completed it should be forever insured, supported, and maintained at the expense of the county of Stafford and the town of Stafford in the proportions following: that one tenth part of the charges should be paid by the mayor, aldermen, &c., of Stafford, and the remainder by the inhabitants of the county; that it should be lawful for the county justices to order the shire hall to be insured, supported, maintained, and repaired as they should think fit, and that they should and might order the expenses of the insurance and repairs to be paid in the proportions before mentioned.

After the completion of the hall the sum of 1000*l.* was, in pursuance of the act and of an order of county justices, expended in insuring and supporting the hall, and a tenth part thereof ordered to be paid by the mayor, &c., of Stafford, and the remainder by the inhabitants of the county. Subsequently, a further sum of 28*l.* 2*s.* was ordered by the county justices to be laid out in repairing the hall, and a tenth part of that sum was ordered to be paid by the mayor, &c., and the remainder by the inhabitants of the county:—

Held, first, that the mayor, &c., were bound to pay their proportion of the 1000*l.* actually expended, although they had not been summoned to oppose the order of justices, nor had any notice that it was about to be made; and, secondly, that they were bound to pay their proportion of the sum of 28*l.* 2*s.*, although that sum had not been expended before the action.

DEBT. The first count of the declaration stated that after the passing of an act of Parliament, the 34 Geo. 3, c. 97, ("An Act for building a new shire hall for the county of Stafford,") the new shire hall therein mentioned was completed according to the act; that it continued to be insured, supported, &c., by order of the justices of the county of Stafford; that after the completing of the same, the sum of 1000*l.* had, in pursuance of the said act and of the said order of justices, been expended in insuring and supporting the said hall, and that the said justices ordered that a tenth part of the said sum of 1000*l.* should be paid by the defendants, and the remainder by the inhabitants of the county of Stafford, of which the defendants had notice. Breach, non-payment of the sum of 100*l.*

The last count recited that, whereas after the completing of the said new shire hall at the General Quarter Sessions for Staffordshire, the justices, by their order, after reciting that an estimate had been made of the money proposed to be expended in repairing, &c., the shire hall, and reciting that that estimate amounted to 28*l.* 2*s.*, did order that the said sum of 28*l.* 2*s.* be laid out in repairing, &c., the said shire hall, and that one tenth part of such sum should be paid by the defendants, and the remainder thereof by the inhabitants of the county of Stafford, of which the defendants had notice, and that the said repairing, &c., of the said shire hall was at the time of the ordering thereof what the occasion then required. The declaration

¹ 20 Law J. Rep. (N. S.) Exch. 171.

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then stated a request to the defendants to pay their proportion and their refusal.

Fifth plea to the first count, that the defendants were not summoned to oppose the said order, nor had they any notice that the same was about to be made. There were similar pleas to other counts.

To the last count there was a general demurrer, the ground of which was, that it was not shown that the sum ordered to be expended had been expended before this action, and that the defendants were not liable to be sued until such sum had been expended.

Demurrers to the fifth and other similar pleas; the principal point being that the orders to which the pleas related were lawfully made *ex parte*.¹

Keating, (*Gray* with him,) for the plaintiff, in support of the last count and of the demurrers to the pleas. The pleas are bad. It cannot be necessary to summon the mayor and corporation to consider the estimate about to be made of the cost of repairing the hall: as well might it be said that every rate payer ought to be summoned before any rate is made. Secondly, the last count is good. It is framed in accordance with the 31st section of the act of Parliament. One tenth of the expenses of insuring and supporting the hall is

¹ The 31st section of the 34 Geo. 3. c. 97, intituled "An Act for building a new shire hall for the county of Stafford," enacts: "That when the said shire hall shall be completed, finished, fitted up, and furnished, such hall shall be forever thereafter insured, supported and maintained and provided with proper accommodations and furniture from time to time as occasion shall require, at the expenses and charges of the said county of Stafford and the said town of Stafford in the proportions following, (that is to say,) one tenth part of the charges and expenses to be occasioned as aforesaid shall be from time to time paid by the mayor and burgesses of the said borough of Stafford, and the remainder thereof by the inhabitants of the said county of Stafford at large, in such manner as the jail, houses of correction, or other public works or buildings of the said county, is, are, or may be supported or maintained, and that it shall or may be lawful for the justices of the peace for the said county at any general quarter sessions of the said county, or the major part of them then assembled, from time to time, to order the said shire hall to be insured, supported and maintained and provided with proper accommodations and furniture, and to be repaired and altered in such manner as they shall think fit; and the said justices at such quarter sessions shall and may from time to time appoint one or more person or persons to look after and take care of the said shire hall and the several apartments thereof, except the rooms and apartments to be appropriated for the separate and distinct use of the mayor and burgesses of the borough of Stafford aforesaid, and shall and may order such salary or allow such fees to such person or persons as they the said justices shall think proper, and also shall and may order the expenses and charges thereof, as likewise of the furniture, insurance, and repairs of the said shire hall from time to time to be paid in the proportions before mentioned, and such part thereof as is to be borne by the inhabitants of the said county of Stafford, to be defrayed and paid by and out of the moneys to be raised by the general rates and assessments made, and to be made, assessed, and levied in the said county by virtue of the several acts of Parliament made in the 12th and 13th years of his late majesty King George the Second, and in such manner as is directed in and by an act of the 9th year of his present majesty, intituled 'An Act to enable the justices of the peace in the general quarter sessions of their respective counties and divisions to repair the shire halls, county halls or other buildings, wherein the assizes or grand sessions are usually held.'"

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payable before the whole is expended. The money is to be raised first, and expended afterwards.

W. H. Willes, contra, for the defendants. The fifth plea is good. The expenses are to be incurred before payment is to be made. Under the 31st section the corporation are only liable to pay the money that has been actually expended.

[*Alderson, B.* How is the money to be paid unless it is raised at the time ?]

It must be raised on credit.

PARKE, B. The plaintiff is entitled to the judgment of the court. The last count is good. When the justices have fixed the requisite sum, they may order it to be levied on the county and borough; and the defendants are liable to pay before the money has been expended. If, indeed, the parties can procure any person to advance the money to them, they are at liberty to do so. They are entitled to raise the money retrospectively, and are not tied down to one mode more than to another. The 31st section does not restrict them to either of the two courses. The pleas are bad, for it was not necessary to summon the mayor or corporation before the proportion was ordered to be paid. Our judgment must, therefore, be for the plaintiff.

ALDERSON, PLATT, and MARTIN, BB., concurred.

Judgment for the plaintiff.

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1. *Presumption — Act of Parliament — Parish Rates.]* An act of Parliament was passed in 1816, for the purpose of raising 5000*l.* for the repair of one of the parish churches in London. The act appointed certain persons to be trustees, and gave them the power of levying rates, and authorized them to raise the money required by the granting of life annuities, by way of simple annuity, or for the lives of two persons or the survivor, with this restriction, that no annuity should be granted for

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any single life at a higher rate than 8l. 3s. per cent. when the life of the annuitant should be under thirty-five. In 1817, in consideration of 2500l. paid by A, the trustees granted an annuity of 225l. to A and B and the survivor. B was then thirty-three years of age. Another act was passed in 1819, which recited that the trustees had raised 5000l. and granted annuities to the extent of 297l., (which included the above-mentioned sum of 2500l., and the annuity of 225l.,) and enacted that the annuities already granted should be paid in the first place out of the rates. The annuity was paid up to 1848, when the trustees resisted further payment, on the ground that the grant had been void under the act of 1816:—
Held, that, if the grant had been void under the act of 1816, the defect was cured by the act of 1819. *Delarue v. Church*, 160.

2. *Semble*, the restriction contained in the act of 1816 was directory, and not prohibitory. *Ib.*
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Held, on a bill filed by the vendor for specific performance, that the supplemental agreement was a substitution for the original contract, and that A B was not entitled to demand that the vendor should distinguish the freehold from the copyhold parts of the premises so as to show that the latter did not include any of the buildings. *Dawson v. Brinckman*, 239.

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CONTRIBUTORY.

Contributory — Trustee's Liability.] The directors having improperly given shares to the managing director, he induced his brother to execute the deed in his name for part of these shares. The directors subsequently recalled these shares: —

Held, that the brother was a contributory. *Holt's Case*, 208.

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COPYRIGHT.

Payment.] *Semble*, that where the proprietors of a review employ persons to write in the review, the articles written must be paid for, in order to vest the copyright in the proprietors, under stat. 5 & 6 Vict. c. 45. *Richardson v. Gilbert*, 268.

COSTS.

1. *On Appeal Motion.*] Where the successful party on an appeal motion obtained the discharge of the order of the court below, but it appeared that he had not instructed counsel in the court below to oppose that motion, but opposed it in person, and did not furnish the court with proper materials for its judgment, the order of the court below will be discharged without costs. *Hall v. Hall*, 191.

2. *On Demurrer.*] A demurrer on the record having been allowed, and a demurrer *ore tenus*, for want of parties, having been overruled, the court ordered the defendants to pay the costs of the former, but made no order as to the costs of the latter; and gave the plaintiff leave to amend either by adding parties, or striking out the passages which made the new parties necessary. *Macintyre v. Connell*, 249.

3. *Costs in Special Cases.*] At the hearing of special cases, under the 13 & 14 Vict. c. 35, the court has power to give directions as to costs. *Jackson v. Craig*, 173.

4. *On setting down Short Claims.*] See *Hills v. Treacher*, 75.

See WINDING-UP ACTS, 8.

CREDITOR'S SUIT.

1. *Evidence of Deposit.*] Possession of title deeds by a bond creditor is not of itself sufficient evidence of a deposit by way of equitable mortgage. *Chapman v. Chapman*, 70.

2. *Reference to Master.*] Where the plaintiff failed to prove his right to an equitable mortgage, the court refused to direct a reference to the master for further inquiry. *Id.*

3. *Prayer for Relief.*] A bond creditor not having prayed an account of the testator's real estates in a suit for payment of his debt, he was held not entitled to such relief under the prayer for general relief. *Id.*

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CROSS EXAMINATION.

See EVIDENCE, 1.

DAMAGES.

To Land by Railway Co.] A land owner, whose property was not taken, used, or directly interfered with by the railway company, gave the company notice, under the 68th section of the Lands Clauses Consolidation Act, of his claim for compensation by reason of his property being "injuriously affected" by the execution of the works, whereby his goods were damaged by the dust and dirt, and customers were prevented coming to his shop; and required the company either to give a written agreement for payment of the amount claimed, or to issue a precept to the sheriff to summon a jury for settling the compensation. The company filed a bill against the land owner, alleging that the property in question was not "injuriously affected" within the meaning of the 68th section, and praying an injunction to prevent the defendant from proceeding on his notice. Wigram, V. C., granted the injunction, on the authority of the *London and Northwestern Railway Company v.*

Smith :—

Held, dissolving the injunction, that the right to compensation under the 68th section was not confined to damage sustained by persons whose lands are taken, used, or directly interfered with, but extended to consequential damage; that the proper jurisdiction to decide the question of damage, and the *quantum*, was the sheriff's jury; and that there was no equity for this court to interfere. *East and West India Docks, &c., Co. v. Gatlke*, 59.

DECREE IN PARTITION.

Form of:]

See *Boura v. Wright*, 190.

DEMURRER.

See PLEADING, 2. COSTS, 2.

DEPOSIT.

Evidence of:]

See CREDITOR'S SUIT, 1.

DEPOSITIONS.

Value of, as Evidence.]

See EVIDENCE, 1.

DEVISE.

When void for Uncertainty.]

See WILL, 5.

DISMISSAL.

See PRACTICE, 2, 3.

DISSOLUTION.

See WINDING-UP ACTS, 7.

DYING WITHOUT ISSUE.

See WILL, 3, 4.

ELECTION.

In devise of Real and Personal Estate.] Real estate was settled on A in tail, with remainder to B and her children, and A was absolutely entitled to certain personal estate. A, being so entitled, by one settlement dated the 1st of July, 1841, and made on her marriage, assigned her personal estate to trustees, upon trust for herself for life, with remainder to C for life, with remainder to B and her children; and by another settlement of the same date, also made on her marriage, conveyed the

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real estate, to which she was entitled as tenant in tail, to trustees, upon trust for herself for life, with remainder to C for life, with remainder to B and her children.

A died without having barred the entail:—

Held, that B and her children were put to their election between the life estate in the realty given to C by the second deed, and the benefits in the personalty given to them by the first deed. *Bacon v. Cosby*, 186.

EQUITY.

See DAMAGES, 1.

EQUITABLE MORTGAGE.

See CREDITOR'S SUIT.

EVIDENCE.

1. *Affidavit Evidence—Depositions—Cross Examination.*] Opinion of the court on the relative value of evidence given by affidavit and by depositions taken on written interrogatories, and on the use of cross examination. *Attorney General v. Lord Carrington*, 73.

2. *Husband and Wife—Proof of Access.*] A husband and wife lived separate. Eight years afterwards the wife had a child. The husband swore in an affidavit that he had had intercourse with his wife since the separation, but the court refused to admit this as evidence. *Patchett v. Holgate*, 100.

3. *Of Accounts.*] A gave a bond to B for 4000*l.*, and died, leaving C his executor. B died, leaving D his executor. Bill by D, against C, to enforce the bond. C filed a cross bill against D, alleging that there had been various accounts between A and B, and that the bond ought to be taken subject to the account, and not according to the letter; and, in support of such allegations, adduced, as evidence, an account in the handwriting of B. A decree was made in the causes for taking the accounts between A and B, and for an inquiry as to the circumstances under which the bond was given:—

Held, on exceptions to the master's report, that the account in B's handwriting was to be taken as evidence in favor of B and against A, as well as in favor of A and against B. *Dickin v. Ward*, 183.

4. *Secondary.*] Bill against infant defendants. The plaintiff had served defendants' solicitor with notice to produce a particular deed in his possession. The defendants' solicitor sent to the plaintiff a copy of the deed:—

Held, that the production of the copy at the hearing did not amount to secondary evidence of the deed against the infant defendants. *Bacon v. Cosby*, 186.

5. *Evidence of Consideration.*] A deed taken to be proved at the hearing by its production, and an affidavit of the handwriting of the parties who had executed it, on the ground of there being before the court, at least, evidence of an agreement to do a thing for valuable consideration. *Ib.*

6. *Presumption in Favor of Grant.*]

See GRANT. CREDITOR'S SUIT. PRIVILEGED COMMUNICATIONS. PRACTICE, 6.

EXCEPTIONS.

See PLEADING, 1.

EXECUTOR.

Administration Suit—Executor's Affidavit.] In particular circumstances, sums will be allowed to an executor on passing accounts on his own affidavit, and without vouchers. *Caton v. Ridout*, 99.

EXECUTORS.

See WINDING-UP ACTS, 1.

EXECUTION.

See BANKRUPTCY.

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FIRE.

When Waste.]

See LUNATIC.

FORM.

Of a Decree in Partition.]

See *Bowra v. Wright*, 190.

GRANT.

Almost every thing will be presumed in favor of a grant fairly made, and under good advice on the part of the grantors, and acted upon for upwards of thirty years. *Delarue v. Church*, 160.

HUSBAND AND WIFE.

1. *Reversionary Interests.*] A married woman can do no act to affect her reversionary interest in a sum of money charged upon land, during the lifetime of the tenant for life. *Hobby v. Allen*, 166.
2. *Wife's separate Income.*] An order had been made for payment of the wife's life income of a fund in court to the husband, with liberty to apply. The husband separated from his wife, and became bankrupt. The husband having besides received a considerable sum, two thirds of the income were directed to be paid to the wife, the other third to the assignees of the husband. *Vaughan v. Buck*, 135.
3. *Proof of Intercourse between.*]

See EVIDENCE, 2.

INFANCY.

1. *Practice as to Special Case under the 13 & 14 Vict. c. 35.*] An application may be made by an infant for a guardian, under the 13 & 14 Vict. c. 35, s. 5, without a next friend. *Craig, ex parte*, 85.
2. As to signature of counsel to special cases and setting down of special cases for hearing. *Ib.*
3. *Next Friend.*] A bill having been filed at the suit of infants, *cestuis que trust*, by their next friend, charging breaches of trust, and praying the usual administration accounts against the trustees, a motion was made on behalf of the defendants that the bill might be dismissed, or for a reference to inquire whether it was for the benefit of the infants that the suit should be proceeded with; and if so, to inquire whether the next friend was a proper person to fill that character; and if not, to approve of another person to act as next friend. The grounds alleged as a foundation for the motion were, that the suit was set on foot from sinister motives by the father of the infants, who had become bankrupt, and was separated from his wife, the mother of the infants, to whose support he had ceased to contribute; that the next friend was a stranger to the matters at issue in the suit, and a mere nominee of the father; and that the proper form of proceeding (if any) was by claim, or request to the trustees to pay the trust fund into court under the Trustee Relief Act, and not by bill. The evidence for the motion failing to establish the existence of a sinister motive leading to the institution of the suit, or any imputation upon the character or solvency of the next friend, but merely showing that the circumstances under which he was named as next friend were open to suspicion, the court dismissed the motion, but without costs, observing, that the questions as to the propriety of the suit, and of the form of proceeding therein, might properly be dealt with at the hearing. *Smallwood v. Rutler*, 210.

INFANTS.

See PARTITION.

INJUNCTION.

1. *Railway Company—Compensation.*] A railway having been made across the road leading to a farm, the land owner served a notice on the railway company under the Lands Clauses Act, claiming 550*l.* as compensation, or requiring the company to

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summon a jury to assess the compensation. The company filed their bill, alleging that the damage complained of was not an injuriously affecting the land within the Lands Clauses Act, and obtained an *ex parte* injunction to restrain the land owner from taking any other proceedings under that act:—

Held, that the injunction could not be maintained. *South Staffordshire Railway Co. v. Hall*, 105.

2. *Capital — Misapplication — Purposes not within the Powers.*] The Shrewsbury and Chester Railway Company were, by various acts of Parliament, empowered to make several railways, and also to build wharves and warehouses for the purposes of the traffic of the company on the banks of the River Dee, the conservancy of which was vested in other persons. The railway company brought a bill into Parliament to preserve and improve the navigation of the river, though it had no power to apply any of the capital of the company for that purpose. Upon a bill filed by one shareholder:—

Held, that the directors of the railway company could not legally apply any of the railway capital in payment of the expenses of preparing, prosecuting, or promoting the bill in Parliament, or for any other purpose not authorized by the acts of the railway company, and an injunction was granted to restrain them from so doing. *Munt v. The Shrewsbury & Chester Railway Co.*, 144.

3. *Sequestration.*] During the construction of a railway an injunction was granted against the company, restraining them from further interfering with a particular road, and from so constructing their works as to obstruct, impede, or render less secure the same road, or so as to hinder or prevent the passage of carriages along the same. The company then laid their permanent rails over the road on a level, and, by the direction of the commissioners of railways, erected gates across the road, for security of passengers, and, with the sanction of the same commissioners, opened the line for public traffic; whereupon the court ordered a sequestration to issue for breach of the injunction, and refused to suspend the issuing of process until an appeal against the order could be heard. *Attorney General v. The Great Northern Railway Company*, 263.

INJURIOUSLY AFFECTED.

Construction of those Words.]

See DAMAGES, 1.

JOINT-STOCK COMPANIES.

See WINDING-UP ACTS.

LANDS CLAUSES CONSOLIDATION ACT.

See DAMAGES, 1.

LANDLORD AND TENANT.

See MORTGAGE.

LEGITIMACY.

See EVIDENCE, 2.

LOAN SOCIETY.

See WINDING-UP ACTS, 4.

LUNATIC.

Waste — Accidental Fire.] A testator devised to A, for life, a house and other real estate, "he committing no manner of waste, and keeping the premises in good and tenantable repair." In July, 1837, A entered into possession, and in November, 1844, the house was totally destroyed by an accidental fire. In 1845, A was found lunatic by inquisition, and the lunacy was dated from the 1st of October, 1843. Upon petition in lunacy of the remainder-men, who were also committees of the person and estate:—

Held, that the lunatic's estate was liable under the terms of the condition to reinstate

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the house; and a reference was directed as to what amount ought to be expended in rebuilding, and out of what fund the expense should be paid, with liberty to the next of kin to take a case to law upon the construction of the condition. *Stingley*, in re, 91.

See WILL, 2.

MAINTENANCE.

See WILL, 2.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MERGER.

See PRINCIPAL AND SURETY

MISAPPLICATION.

Of Capital, by Railway Co.]

See INJUNCTION, 2.

MONEY PAID INTO COURT.

1. *Investment.*] Money paid into court by the Liverpool Dock Trustees, in respect of leaseholds for years, taken by them under the powers of their act of Parliament, ordered to be reinvested in the purchase of copyholds of inheritance. *Coyle's Estate*, in re, 224.

2. *Reinvestment of Compensation Money.*] Money paid into court by a railway company for land taken under the Lands Clauses Act, from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not the subject of a commission of lunacy, ordered after his death not to be reinvested in, or considered as land, but to be paid to his executors. *Flamank*, ex parte, 243.

MORTGAG.

Rights of Mortgagee.] In March, 1840, A, and B, a solicitor at Carmarthen, raised 2500*l.* by sale of a sum of stock of which they were trustees, with the intention of lending it on mortgage to C, who resided at Carmarthen, but spent part of the year in London. A enabled B to receive the 2500*l.* for the purpose of the loan, and intrusted him with the conduct of the transaction. Accordingly, B prepared the mortgage deed; and, on the 29th of May, 1840, through his London agents and by arrangement between him and C's solicitor procured C (who knew that the money was in B's hands) to execute it, and to sign a receipt on the back of it for the 2500*l.* The agents took the deed away with them, and, shortly afterwards, procured A to execute it, and then sent it to B. It having been arranged, between B and C, that the mortgage money should be paid into the Carmarthen bank, to C's credit, B, on the 31st of May, paid 513*l.*, and on the 31st of October, 1050*l.*, accordingly, in part of the 2500*l.* In November, he died insolvent:—

Held, that, as between A and C, A was to be treated as mortgagee for the whole 2500*l.* *West v. Jones*, 225.

See CREDITOR'S SUIT.

MORTMAIN ACT.

See WILL, 1.

NEXT OF KIN.

See PRACTICE, 5.

PARTIES.

See PRACTICE, 5.

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PARTITION.

Practice — Infants.] Form of a decree for partition, since the 13 & 14 Vict. c. 60, where infants are parties to the suits for the partition. *Boura v. Wright*, 190.

PARTNERSHIP.

1. *Receiver.*] Where it is not the object of a suit to obtain a dissolution of a partnership, but, on the contrary, to continue the partnership, it is not the practice of this court to grant, in the course of that suit, a receiver and manager; but the court might depart from this rule if it were shown that, unless a receiver was appointed, the partnership concern was likely to be destroyed by the acts of the defendant. *Hall v. Hall*, 191.
2. *Costs.*] Where the successful party on an appeal motion obtained the discharge of the order of the court below, but it appeared that he had not instructed counsel in the court below to oppose that motion, but opposed it in person, and did not furnish the court with proper materials for its judgment, the order of the court below will be discharged without costs. *Id.*

PATENT

Injunction.] The plaintiffs, the assignees of a patent, granted a license to the defendant to use the patent upon the terms of his paying an annual rent of 2000*l.*, to be made up at the end of each year, and reserved to themselves the power of determining the license in the event of default being made in payment of this rent. The defendant failed in paying the rent; but the plaintiffs, notwithstanding, for several years allowed the defendant to use the patent, and received from him a less annual sum than that stipulated. At length, however, they determined the license, having, subsequently to the expiration of the previous year, received from the defendant payments on the footing of the reduced rent:—

Held, that, by so doing, the plaintiffs had elected not to treat the previous breach as a forfeiture of the license, and that consequently they were not entitled to an injunction restraining the defendant from using the patent. *Warwick v. Hooper*, 233.

See COPYRIGHT.

PAYMENT OUT OF COURT.

See PRACTICE, 7.

PLEADING.

1. *Scandal — Answer — Exceptions.*] The answer of a defendant contained these passages: "The plaintiff is desirous of annoying and harassing the defendant to extort money from him." "The plaintiff is acting under the advice of ignorant but cunning persons, who are in expectation of extorting money from the defendant, in order to be relieved from being harassed by the vexatious and illegal conduct of the plaintiff." The plaintiff took exceptions to these passages for scandal. The exceptions were overruled. *Stanton v. Holmes*, 171.
2. *Parties — Demurrer.*] A filed a bill against B and the public officer of a banking company, seeking to make certain shares, which B held in the bank, available to the payment of a debt due to him from B. The bill alleged that, though the company had a prior charge on the shares for a debt due to them from B, yet that debt was amply secured by the shares of other persons in the bank, and by other securities held by the company; and it prayed that an account might be taken of what was due to the company in respect of their charge; and that directions might be given for the satisfaction thereof out of the last-mentioned shares, and out of or by means of the other securities held by the company, or for enabling A to pay to them the amount of their charge, and, thereupon, to have such other securities assigned to him; and that the securities might be marshalled, so as to give the plaintiff the benefit of his charge.
3. A demurrer, because the persons who had pledged their shares, and given securities to the company for B's debt, were not made parties to the bill, was allowed.
4. A bill contained a charge with a view to discovering who certain persons, who were interested in the relief, were; but it did not allege that the plaintiffs did not

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know who they were; and, therefore, a demurrer because they were not made parties was allowed. *Macintyre v. Connell*, 249.

See CREDITOR'S SUIT, 3. PRACTICE, 4.

PRACTICE.

1. *Amendment — Appearance.*] Appearance for a defendant resident abroad ordered under the 29th order of the 8th of May, 1845, where the solicitor, who appeared for him to the original bill, had been served with a *subpoena* to appear to an amended bill under the 26th order. *Zulueta v. Vincent*, 76.
2. *Amendment — Dismissal.*] A bill, as amended, was against a former defendant, S., from whom no further answer was required, and three new defendants. The three new defendants filed their answer, and required security for costs. Nothing further was done for eight months, when the plaintiff proposed two sureties. A week afterwards the defendant S. moved to have the bill dismissed, and the bill was accordingly dismissed as against him. *Drioli v. Sedgwick*, 77.
3. *Dismissal.*] The executor of a deceased defendant cannot move that the plaintiff should revive the suit against him within a limited time, or that the bill should be dismissed, with costs, against such deceased defendant; and a motion by an executor for that purpose was refused, with costs. *Reeves v. Baker*, 262.
4. *Statement of Claim.*] The plaintiffs filed their claims, stating that the defendant had purchased wools of their agent for 180*l.*; that the defendant gave a check for the amount to the agent, by whom it was enclosed in a letter, and posted for the plaintiffs; that the letter never came to hand, nor had the check been received by the plaintiffs, or presented at the bankers' — in fact, that it was lost; that, except by the delivery of the check to the plaintiffs' agent, no payment had been made by the defendant for the wools, and that the defendant still remained indebted to the plaintiffs in the price thereof, but that, having given the check, the defendant could not be sued for the debt in a court of law. The claim asked for payment of the purchase money, upon an indemnity against payment of the check being given to the defendant by the plaintiffs. The plaintiffs, at the hearing of the claim, adduced evidence for the purpose of proving the agency and the loss of the check; and they endeavored to establish a case, in the event of the agency not being proved, that on the check being posted they acquired a property therein as owners, whereby, independently of the agency, they became entitled, as the check was lost, to sue in this court for the debt; and they further set up a promise to give them a fresh check, alleged to have been made to them by the defendant in a letter. The defendant denied the agency, and resisted a decree being made on the claim, on the ground of want of privity of contract. The court dismissed the claim, holding, first, that the case stated on the face of the claim was not proved by the evidence; secondly, that the claim of property in the check, independently of the question of agency, was not sufficiently put in issue by the allegations of the claim; and, thirdly, that there was no consideration shown for the promise in the letter. *Johns v. Mason*, 272.
5. *Proceeding by Claim.*] The orders of April, 1850, authorizing proceedings in this court by claim, are not intended to alter or affect the ordinary rule of the court, which requires parties, in establishing their case, to proceed *secundum allegata et probata*. *Id.*
6. *Next of Kin — Numerous Parties.*] Bill by four of the next of kin of an intestate, for the administration of his estate, on behalf of themselves and all others the next of kin. The bill alleged that the next of kin were very numerous, but no evidence of that fact was adduced. Upon an affidavit, under the 13 & 14 Vict. c. 35, that the next of kin were upwards of twenty in number, the court made the usual administration decree. *Smith v. Leathart*, 170.
7. *Plaintiffs' and Defendants' Affidavits — Evidence.*] In orders made upon claims, the affidavits of the plaintiffs and the defendants will be entered as read, with a direction to the master that the plaintiffs' affidavits are not to be considered as evidence, and that the defendants' affidavits are to be treated in all respects as if they were their answers to bills filed against them. *Cockburn v. Green*, 191.
8. *Payment out of Court — Prospective Order.*] Order made that certain sums which had been ordered to be paid into court, but had not been paid in, might, after they were paid in, be paid out to the party entitled to them. *Milne v. Gilbert*, 185.

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9. *Motion* — Stat. 13 & 14 Vict. c. 35 — *Reference to the Master as to Debts.*] A motion under the 19th section of the 13 & 14 Vict. c. 35, for a reference to the master to take an account of the debts of a deceased person, must be made in court. In re *Harrold*, 144.
10. *As to Signature of Counsel to special Cases and setting down of special Cases for hearing.*]
- See *Craig*, ex parte, 85. *Hills v. Treacher*, 75. COSTS. CREDITOR'S SUIT. INJUNCTION, 3. INFANCY, 3. RECEIVER. WINDING-UP ACTS, 7, 8.

PRECATORY WORDS.

In a Will.]

See WILL, 6.

PRESUMPTIONS.

In favor of Grant.]

See GRANT.

PRINCIPAL AND SURETY.

1. *Agreement between Creditor and Principal — Reservation of Remedy against Surety — Receiver.*] H. & B., partners in trade, being largely indebted to the plaintiffs, their bankers, in 1844, the plaintiffs required security for the debt. B. thereupon delivered to the plaintiffs, at various times, several joint and several promissory notes of himself and the defendant, his aunt, payable on demand. In 1848 an agreement was come to between H., B., and the plaintiffs, unknown to the defendant, and which was carried into effect by three instruments, that H. should retire from the partnership; that B. should take upon himself the partnership debts; that B. should pay the plaintiffs the partnership debt by instalments of 200*l.* a month, and give a bond conditioned for such payment, such bond to be deemed an additional or collateral security, and not a release of the previous debt; that while the instalments should be duly paid, the existing sureties should not be proceeded against, except in certain events mentioned; and it was declared, that such matters should not in any manner prejudice, annul, or otherwise affect the rights and remedies of the plaintiffs against any sureties, but all such persons should remain liable to the same extent as they would have been if the agreement had not been made or the bond given; and that the plaintiffs should not take any proceedings at law or in equity against B. so long as the instalments should be paid, unless upon certain events therein mentioned, and except at the instance of the sureties; and the plaintiffs released H. from all personal liability to the payment of the partnership debt. In 1849 B. became bankrupt, and then the plaintiffs applied to the defendant for payment of the promissory notes which she had executed. The plaintiffs now filed their bill for the purpose of obtaining payment of these securities out of certain estates which were settled to the separate use of the defendant, and for a receiver. The defendant, by her answer, set up several grounds of defence, which in equity would be good answers to the bill, but admitted the execution of the promissory notes. Lord Langdale, M. R., upon the motion of the plaintiffs, made an order for a receiver, which was now discharged:—

Held, that there was sufficient doubt as to the effect of the several transactions in this case upon the liability of the surety, to induce the court not to interfere with the possession of the surety. *Owen v. Homan*, 112.

2. Meaning of the rule, that there must be equity confessed on the answer to entitle the plaintiffs to certain remedies. *Ib.*
3. Observations as to the effect upon the liability of the surety, by the creditor having precluded himself from suing the principal debtor except in certain events. *Ib.*
4. The reservation of the creditor's rights against the surety may be construed in subordination to what shall be found to be the general intent of the parties. *Ib.*
5. Effect of the bond given by B. upon the original simple contract debt. Can the declaration, that it was not to operate as a release, prevent the legal effect of merger under the circumstances of this case? *Quære. Ib.*

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PRIVILEGED COMMUNICATIONS.

Letters between Co-defendants and others.] The plaintiffs, who were assignees of a bankrupt firm at Tenerife, filed their bill against the defendants, three brothers, one of whom managed the business of the Tenerife firm, for an account of certain remittances forwarded by the manager of the Tenerife firm to his brother, as agent in London. The defendant, the London agent, set up as a defence certain proceedings in the Lord Mayor's Court, instituted by the third defendant as executor of his father, under which the money in the hands of the agent of the Tenerife firm was attached for a debt alleged to be due to the estate of the father. Upon motion for production of documents, it was held, that letters which had passed between the London agent and his solicitors with reference to the litigation in this suit were privileged; that letters which had passed between such solicitors and the attorney acting in the proceedings in the Lord Mayor's Court were also privileged; but that the letters from the defendant, the manager of the Tenerife firm, to the co-defendant, the agent in London, for the purpose of being communicated to his solicitors, with a view to the litigation in this suit, were not privileged. *Goodall v. Little*, 79.

PRODUCTION OF DOCUMENTS.

See PRIVILEGED COMMUNICATIONS.

PUBLICATION.

See WILL, 7.

RAILWAY COMPANY.

1. *Purchase Money of Land — Trustees — Payment of Dividends.*] A part of some lands, which had been vested in trustees under the Municipal Corporations Act, was taken by a railway company, and the purchase money was paid into court. Order made for the investment in consols, and the payment of the dividends to any two of the trustees for the time being. In *re Collins's Charity, &c.*, 143.

2. *When liable for Injury to Land.*]

See DAMAGES, 1.

3. *Misapplication of Capital by.*]

See INJUNCTION, 1, 2, 3.

RECEIVER.

Against a Party in Possession.] After a verdict upon an issue *devisavit vel non*, the court appointed a receiver against the party to whom possession of estates had been given by the trustees of the legal estate under an order of this court, though an order nisi had been obtained for a new trial. *Bainbrigg v. Bainbrigg*, 86.

See PRINCIPAL AND SURETY. PARTNERSHIP.

RELIEF.

See CREDITOR'S SUIT, 3.

REPAIR.

Covenant to keep in.]

See LUNATIC.

REVERSIONARY INTEREST.

Of married Woman.] A married woman can do no act to affect her reversionary interest in a sum of money charged upon land, during the lifetime of the tenant for life. *Hobby v. Allen*, 166.

SCANDAL.

See PLEADING, 1.

SEQUESTRATION.

See INJUNCTION, 3.

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SET-OFF.

See WINDING-UP ACTS, 6.

SHORT CLAIMS.

See *Hills v. Treacher*, 75.

SPECIAL CASES.

Costs in.]

See COSTS, 3.

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When directory or prohibitory.]

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SUIT.

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SURETY.

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THELLUSSON ACT.

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TRANSFER OF SHARES

See WINDING-UP ACTS, 2.

TRESPASS.

See TROVER.

TRUSTEES.

1. *Mortmain Act — Discretion of Trustees — Education.*] A testator bequeathed the residue of his estate to trustees, to be purchased into the funds, for the following purpose, viz., for opening new schools, subscribing to those already opened in England, Scotland, Ireland, and elsewhere, and purchasing land to be let out to the poor at a low rent, such rent to be applied to any benevolent purposes his trustees might think proper:—

Held, that the residue was divisible into two equal parts, and that one of such parts was applicable to the purposes of education, according to a scheme to be settled by the court, and that the trusts of the other part were void under the Mortmain Act. *Crafton v. Frith*, 164.

Chancery.

2. *Discretion of.*

See CONTRIBUTORY, 1. RAILWAY COMPANY, 1. WILL, 1.

UNCERTAINTY.

What sufficient to avoid a Devise.]

See WILL, 5.

WASTE.

By accidental Fire.]

See LUNATIC.

WIFE.

See HUSBAND AND WIFE.

WILL.

1. *Construction — Mortmain Act — Discretion of Trustees — Education.]* A testator bequeathed the residue of his estate to trustees, to be purchased into the funds, for the following purpose, viz., for opening new schools, subscribing to those already opened in England, Scotland, Ireland, and elsewhere, and purchasing land to be let out to the poor at a low rent, such rent to be applied to any benevolent purposes his trustees might think proper:—

Held, that the residue was divisible into two equal parts, and that one of such parts was applicable to the purposes of education, according to a scheme to be settled by the court, and that the trusts of the other part were void under the Mortmain Act. *Crafton v. Frith*, 164.

2. *Construction — Lunatic — Contribution.]* A, the father of C, by his will, gave the income of his residuary estate (after the death of B, the mother of C) to trustees, upon trust, to apply it as they should think proper for the benefit of C; and died in 1815. B, by her will, gave the income of her residuary estate to trustees, upon trust, to apply a sufficient part of the income for the maintenance of C during his life, and declared that, in case there should be a surplus of income, such surplus should be considered as principal, and invested accordingly, and gave such principal on the trusts therein mentioned, and died in 1832. C was found a lunatic in 1818. The annual sums allowed for the maintenance of C were less than the annual income of both the estates of A and B:—

Held, that the income of B's estate was to be first applied for the maintenance of C, in exoneration of the income of A's estate. *Method v. Turner*, 168.

3. *Construction — Dying without Issue.]* A testator, by his will, gave certain shares of his residuary personal estate to certain legatees. He then directed that "the whole of the legatees should have the benefit of survivorship between them, in the event of any one or more of them dying without leaving issue:—"

Held, that "the dying without leaving issue" did not refer to death in the lifetime of the testator. *Smith v. Stewart*, 175.

4. *Construction — Dying without Children.]* A testator, by his will, dated in 1837, left his entire fortune to be equally divided between his two daughters A and B, who were his only children, with a declaration that the share of his daughter A should devolve, in case of her dying without children, to B and her children. At the date of the will A was married, but had no children; and B was married, and had two children. A died without ever having had a child:—

Held, that A took an absolute interest in the personal estate bequeathed by the testator. *Bacon v. Cosby*, 186.

5. *Construction — Devise void for Uncertainty.]* The will of a testator contained the clauses following: "Let my debts be paid. Let all my goods and chattels be sold, and the fund accumulated, except so far as is needed for the comfortable settlement of the family, except 200*l.* a year to be laid by as a marriage portion for my daughter A. A. C. My son E. C. C. is heir to the whole real estate:—"

Held, that the above directions were void for uncertainty, and that the testator was to be taken to have died intestate, both as to his real and personal estate. *Jackson v. Craig*, 173.

Chancery.

6. *Construction — Precatory Words.*] A testator, by his will, gave all his real and personal estate to his wife, to enjoy the same "in the fullest manner, subject to the following provisions." The testator then gave certain legacies. He then desired that all his property should continue at interest, in the same situation as at the time of his death, for the benefit of his wife, and that his wife should make a will and divide the property between his and her relations, in such manner as she should think they deserved. He then declared that, if his wife should be rendered unable to make a will in the manner before suggested, this property should be sold, and that the money should be divided in the manner therein mentioned. The testator then declared that the last clause was "not to do away with, or prevent his wife from exercising, the entire right over his property, should she be enabled to carry it into effect in the way he had left it to her, or in any other most agreeable to herself." The widow of the testator, by her will, gave some legacies to her relations, but did not dispose of the residue of her estate:—

Held, that the testator's property had, under his will, vested absolutely in the widow, and went to her next of kin. *Huskinson v. Bridge*, 180.

7. *Exercise of Power of Appointment.*] By deed, estates were settled to the use of such person or persons, in such parts, shares, and proportions, manner and form, and for such ends, intents, and purposes, and under and subject to such powers, provisoes, and limitations, as S. S. should by deed, as therein mentioned, or by her last will and testament in writing, or any writing purporting to be or in the nature of her last will and testament, to be by her signed and published in the presence of, and attested by two or more credible witnesses, and which she was thereby authorized to make and execute, direct or appoint. S. S., by will, dated in 1826, devised the estate to certain relations, and appointed executors, and signed and sealed the same. The attestation clause was this. "Signed and sealed in the presence of H. P., of," &c., and M. E., housekeeper to Mrs. I. No attestation was contained of the publication. The testatrix died in the same year:—

Held, after a case had been sent first to the Court of Common Pleas, and afterwards to the Court of Exchequer, in conformity with the certificates of both courts, that the power was well exercised. *Vincent v. The Bishop of Sodor and Man*, 198.

8. *Accumulation.*] A direction to accumulate is only valid for one of the periods mentioned in the Thellusson Act. *Wilson v. Wilson*, 138.

WINDING-UP ACTS.

1. *Joint-stock Companies — Executor — Contributory.*] J. S. purchased, through a broker, 120 shares in a joint-stock banking company, in respect of ten of which the grandson of the purchaser executed the deed of transfer as his agent. No other deed of transfer was executed. The purchaser received the dividends upon the whole:—

Held, that he was a contributory in respect of the whole 120 shares, and his executors properly on the list. *Staffon's Executors*, ex parte, 101.

2. *Transfer of Shares — Contributory.*] The holder of shares in a joint-stock banking company, in January, 1847, transferred them to another person. Before the transfer, balance sheets of the accounts up to the end of 1845 and 1846 were completed, from which it was made to appear that there had been considerable profits in those years. Four months after the transfer the bank suspended payments, and subsequently an order for winding up its affairs was made. Before the master, a witness was produced who had prepared the balance sheets, and who deposed that, in fact, there had been considerable losses in 1845 and 1846; but the master refused to place the transferrer of the shares on the list of contributories. The official managers appealed, but the court affirmed the master's decision, holding that he was not liable for losses previous to the date of the transfer. *Holme*, ex parte, 131.

3. *Contributory — Managing Committee-man.*] P. M., a member of the managing committee of a provisionally registered railway company, had allotted to him and accepted 100 shares. At a meeting of the managing committee, at which P. M. was president, an instruction was given to the allotment committee to allot the shares according to a scheme, by which 500 shares were reserved to each member of the managing committee. A report was made by the secretary at a subsequent meeting that the allotment committee had allotted the shares according to the

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scheme. No entry appeared in the allotment book of the allotment of the 500 shares to each managing committee-man. Under an order for winding up the company, the master placed the name of P. M. on the list of contributories for 100 shares, and afterwards for 500 more shares. On appeal from this decision as to the 500 shares, it was held that his name should remain for 400 of them, besides the original 100, in respect of which no appeal was made. *Morrison, ex parte*, 129.

4. *Persons entitled to present Petition — Societies within scope of Acts.*] A petition was presented for the winding up of a loan society, in which certain persons united themselves together, to subscribe 8s. per month for each share for one hundred months, until the payments amounted to 40l. per share, and whenever there should be 200l. in hand, the members were to bid for the purpose of procuring a loan at 5l. per cent., the premiums to be divided among the members. After fifty-one meetings the society ceased its operations, and the petition was presented on the ground that the funds had been mismanaged and the society had come to an end. The petition was resisted for three reasons: *First*, that the petitioner was not entitled to present the petition, as nothing was due to him from the society; *secondly*, that the society did not come within the meaning of the Winding-up Acts; and, *thirdly*, that this was not a case for the interference of the court: —

Held, that the petitioner being a member and claiming to be a contributory of the society, was entitled to present the petition; that the object of the society being profit, it was within the meaning of the acts; and that, under the circumstances of the case, the court was bound to make the order for winding up, although it might be detrimental to the interests of the society. *Smith, ex parte*, 151.

5. *Contributory — Liability of Devisee of a Shareholder.*] A, the holder of shares in a joint-stock company, by his will, devised his real estate to B, and made C his executrix. A died in 1838. At this time, the company was solvent, and all their debts and liabilities, then existing, were afterwards discharged, in the regular way, out of their assets. C, after A's death, was treated as the proprietor of the shares, and for five years received dividends on them. C's name was put on the list of contributories, under the Joint-stock Companies Winding-up Acts, as the personal representative of the testator; but it appearing that the testator's personal estate had been exhausted, B's name was also placed on the list as the legatee of the testator. No action could have been brought against B, and no liability could have been established at law in respect of the shares: —

Held, that B was not liable, under the Joint-stock Companies Winding-up Acts, as a contributory. *Hamer, ex parte*, 177.

6. *Set-off — Percentage to Suits' Fee Fund.* In winding up joint-stock companies, the claims of a contributory against the company in respect of loans made by him to the company, or in respect of informal calls made by the directors prior to the winding-up order, and applied by them in liquidation of the debts of the company, are to be set off against calls, and the amount cancelled is exempt from percentage to the suitor's fee fund. *North of England Banking Co., in re*, 94.

7. *Dissolution — Winding up.*] A provisionally registered railway company having abandoned their undertaking, the directors made two payments to the shareholders in part return of their deposits; and they offered to make a third and final payment, which the whole or nearly the whole of the shareholders, except A, accepted. All the debts and liabilities of the company were discharged, and all the assets of it were exhausted; and A applied for and received the second payment, as being one of the shareholders who had concurred in the dissolution of the company. Nevertheless, he, being dissatisfied, as he alleged, with the directors' accounts, petitioned for an order for the dissolution and winding up of the company, or for winding it up if it had been already dissolved.

The court refused to make the order at once, and directed the master to inquire and state whether it was necessary or expedient that the company should be dissolved and wound up, or wound up. *Williams, ex parte*, 215.

8. *Winding up — Costs.*] A petition praying either that a company might be wound up, or that a preliminary inquiry might be directed as to the expediency of winding it up, was dismissed, as having been presented without sufficient ground; and the petitioner was ordered to pay the respondent's costs, although the respondent was not liable as a contributory, nor had been served with the petition, but appeared voluntarily. *James, ex parte*, 218.

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9. *Creditor.*] The registered secretary to a provisionally registered company, in pursuance of instructions given to him at a meeting of the members or committee of the company, gave orders to an advertising agent to cause the scheme, &c., of the company to be advertised. The agent executed the orders, and paid for the advertisements; and afterwards claimed, before the master charged with the winding up of the company, to be admitted a creditor of the company for the amount paid by him; but he did not know the names of the persons present at the meeting. The master declined to admit the claim as a proof, because the affidavits in support of it did not establish a debt against any particular persons or against the whole class of contributories; and the court, on appeal, confirmed the master's decision. *Lloyd, ex parte*, 279.

See CONTRIBUTORY.

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☐ In this Index, the cases in the Ecclesiastical and Admiralty Courts are denoted by the abbreviations (EC.) and (AD.) All other cases are in the Common Law Courts.

ACCEPTANCE.

On Behalf of Corporation.]

See BILLS OF EXCHANGE, 6.

ACTION.

See DISTRESS, 3.

Parties to.]

See PRINCIPAL AND AGENT.

ADMISSIONS.

By Payment into Court.] In case for distraining for more rent than was due, alleging a sale of the goods, defendants paid money into court:—

Held, that both the distress and the sale were admitted by the plea, and that therefore it was not necessary to show a joint damage beyond the sum paid into court, for that both defendants were liable, although evidence was only given to connect one with the grievance:—

Held, also, that the distress and the sale were substantive grievances, and that the sale was not matter merely of aggravation. *Leyland v. Tancred*, 479.

AFFIDAVITS.

Contradictory.]

See PRACTICE.

AGENT.

See FRAUD, 6, 7.

When he may sue.]

See PRINCIPAL AND AGENT.

AMENDMENT.

Of Declaration after Trial.]

See PRACTICE, 1.

Common Law, Admiralty, &c.

ANNUITIES.

See WILL, 1.

APPEAL.

1. *When it lies.*] An appeal will lie to the lords of the committee of council from a provisional order of the Royal Court of Jersey. *Belson*, in re, 49.
2. *Costs on.*] In an appeal by husband against wife, the court will not make an order for security for costs against the husband. *Ib.*

See PRACTICE, 8.

ARBITRATION.

1. *Charges of Arbitrators — Costs of Umpirage.*] By an agreement of reference, matters were referred to two arbitrators, and if they failed to make an award within a limited time, to an umpire. The costs of the reference and award and umpirage were to be in the discretion of the arbitrators and umpire respectively. The parties agreed that the umpire should sit with the arbitrators, so that, if they did not make an award, it would not be necessary for him to rehear the evidence. The arbitrators did not conclude the reference within the time limited. The parties then further agreed, that the arbitrators should sit with the umpire, and assist him in taking the evidence, which they did. The award ordered the losing party to pay to the other the costs "the said umpirage and of this my award," and that each party should "pay their own costs of the reference other than the costs of my said umpirage and of this my award." The umpire included the charges of the two arbitrators in his costs of umpirage and award, and the same were paid by the successful party on taking up the award: —

Held, that the charges of the arbitrators were costs of the umpirage, and not costs of the reference; and that the successful party was entitled to have such amount as was duly charged by the arbitrators, and paid by him on taking up the award allowed on the taxation of costs, and to have the same repaid to him by his opponent. *Ellison v. Ackroyd*, 445.

2. *Costs of Reference Costs in the Cause.*] Where a verdict is taken subject to a reference of the action to an arbitrator, who is to certify for whom and for what amount the verdict shall be entered, and the costs of the cause and reference are to abide the event, the costs of the reference are costs in the cause, and follow the legal event of the verdict. *Deere v. Kirkhouse*, 449.
3. Agreeing to such a reference at *nisi prius* does not preclude a defendant from applying for costs under the 12 & 13 Vict. c. 106, s. 86. *Ib.*
4. If such an application be successful, the defendant's costs are to be deducted from the amount, exclusive of costs recovered by the plaintiff. *Ib.*
5. It sufficiently appears that the action was commenced subsequent to the passing of the 12 & 13 Vict. c. 106, if the affidavit of the defendant recite the issue delivered by the plaintiff, and that issue show that the action was commenced subsequent to the passing of the act. *Ib.*
6. *Arbitrator — Power over Costs of Award.*] If a submission to reference by agreement containing a clause for making it a rule of court provide that the costs of the reference and award shall be in the discretion of the arbitrator, who may award and direct by and to whom the same shall be paid, the arbitrator cannot by his award conclusively fix the amount of the costs of the award. *Fearnley v. Branson*, 426.
7. *Recovery of Fee paid Arbitrator.*] If, in the award, he name an exorbitant sum as costs of the award, and a party to the reference is obliged to pay such sum to obtain possession of the award, such party may recover the excess beyond what a jury may deem a reasonable compensation to the arbitrator in an action against the arbitrator for money had and received to his use. *Ib.*
8. *Order of Reference.*] Where an order of reference of an inferior court of record, made by consent of the parties, contained a clause that the order might, at the option of either party, be made a rule of her majesty's Court of Queen's Bench, under the stat. 9 & 10 Will. 3, c. 15, it was held, that, as an agreement of reference between the parties, it might be made a rule of court. *Harlow v. Winstanley*, 492.

Taking up Award.]

See RAILWAY COMPANY. 1.

Common Law, Admiralty, &c.

ARREST.

1. *Privilege morando et redeundo.*] A person acquitted on a criminal charge is not entitled to privilege from arrest under civil process, *morando aut redeundo*. *Hare v. Hyde*, 435.
2. *Arrest under civil Process.*] Where, therefore, the defendant in a civil action, immediately after his acquittal and discharge on a trial for a charge of embezzlement at the Quarter Sessions, and whilst he remained in the court, was arrested under a writ of *capias* in the action, this court refused to discharge him out of custody. *Ib.*
3. *Arrest — Discharge.*] The plaintiff in an action, having obtained judgment, proceeded to outlawry against the defendant, who was arrested upon a *capias ulla-gatum*. The plaintiff then died, leaving two infant children, but no personal representative. An application for the discharge of the defendant, upon the ground of the plaintiff's death, was opposed by the late plaintiff's attorney, who had advanced money in the action upon the security of the judgment, and who intended to take out administration to the plaintiff: —
Held, that the defendant was not entitled to be discharged. *Cox v. Pritchard*, 493.
4. *Discharge by Insolvent Court — Discharge by the Plaintiff.*] The plaintiff having recovered judgment in the Court of Exchequer, took the defendant in execution. The defendant petitioned the Insolvent Court, inserting the plaintiff's debt and costs in his schedule. The plaintiff sued out a petition in bankruptcy, upon which the defendant was adjudged a bankrupt. The plaintiff then, with a view of proving his debt under the commission in bankruptcy, agreed to the discharge of the defendant. The Insolvent Court afterwards discharged the defendant. Subsequently, the bankruptcy commissioner granted the plaintiff a certificate, under sect. 257 of the stat. 12 & 13 Vict. c. 106, that he was a creditor for the amount of his debt, minus the costs, upon which the plaintiff sued out a *ca. sa.* in this court, and arrested the defendant.

The court refused to set aside the *ca. sa.*, or to discharge the defendant out of custody; and held, that sects. 40, 90, and 91 of the stat. 1 & 2 Vict. c. 110, did not apply so as to entitle the defendant to freedom from arrest; that sect. 257, of the stat. 12 & 13 Vict. c. 106, applied to creditors who had obtained judgment before proof as well as to other creditors; that the voluntary discharge of the defendant from arrest did not preclude the plaintiff from arresting him on the certificate; that even if the plaintiff were not a good petitioning creditor, by reason of his having arrested the defendant, as no proceedings had been taken in the Court of Bankruptcy to supersede the proceedings, the certificate must be considered as valid, and the *ca. sa.* regular; and that the stat. 12 & 13 Vict. c. 106, has transferred all questions as to the discharge of a bankrupt to the Court of Bankruptcy: —

Held, also, that sect. 40, of the stat. 1 & 2 Vict. c. 110, applies only when the bankrupt has obtained a certificate of conformity, and that it was inserted merely to have the effect of keeping alive the proceedings in the Insolvent Court, only for the purpose of enabling the assignees under the insolvency to reach the property of the bankrupt acquired after the bankruptcy. *Walker v. Edmundson*, 437.

ASSESSMENT.

1. *Principle of Assessment.*] The legal principle of rating sanctioned by the courts and recognized by the Parochial Assessments Act, 6 & 7 Will. 4, c. 96, is applicable to all cases where a company or an individual occupies in different parishes land forming one entire property; and the value which the land occupied in each parish produces, after the proper allowances have been made, is that upon which the occupier must be rated in each. *Regina v. The London, Brighton, and South Coast Railway Company*. *Regina v. The South-eastern Railway Company*. *Regina v. The Midland Railway Company*, 329.
2. *Railway Company.*] The occupation of a railway company does not in its broad principles differ from that of a canal company; and as the 6 & 7 Will. 4, c. 96, provides but one rule, and is intended to secure uniformity of rating, the same principle of assessment must be applied to both cases. Therefore, a rate is to be imposed upon a railway company upon the ordinary principle of ascertaining the actual ratable value of the land occupied by the company in each parish through

which it passes, by the rules which are applicable to any other land occupied by other bodies or persons for other purposes. *Ib.*

3. *Mode of ascertaining ratable Value.*] The ratable value of the portion of railway occupied in any particular parish must be deduced from the net earnings in that parish, ascertained by a comparison of the profits and outgoings arising in that parish; and not by treating the ratable value, however constituted, of the whole line of railway as entire, and dividing it among the several parishes simply according to the distance which the line passes through each. *Ib.*
4. *Deduction.*] By an agreement between the B. Railway Company and the S. Railway Company, the traffic of the latter passed toll free over a certain portion of the line of the former, in consideration of the traffic of the former passing toll free over a certain equal portion of the line of the latter. A portion of the line of the B. Railway, affected by this arrangement, was within the respondent parish; but no part of the line of the S. Railway was within that parish:—
Held, that in estimating the ratable value of the B. Railway within the respondent parish, the value of the tolls which would have been received in respect of the passage of the traffic of the S. Railway Company was to be considered as rent in kind earned by the land, but that such earnings must be subject to exactly the same deductions as if they had been received in money, and therefore the B. Company were entitled to deduct the value of the tolls payable by them in respect of the passage of the traffic over an equal portion of the line of the S. Railway. *Ib.*
5. *Increased Value.*] Where a rate made in November was based on the last published half-yearly accounts of the company made up to the 30th of June preceding, but in the interval between June and November the value of the working plant of the company had greatly increased, the company were held to be entitled to have their deductions calculated upon this increased value, and to have the rate amended accordingly, the sessions upon the appeal having been put into possession of the state of facts really existing when the rate was made. *Ib.*
6. *Prospective Value.*] Parish officers are to make a rate upon the supposed prospective value of the occupation ascertained from the latest evidence in their power as to antecedent value; and although they are justified in rating a railway company upon their latest published accounts, if that is the latest information reasonably procurable, yet if a new state of accounts is communicated to them by the company before they make the rate, they ought to take such new state of circumstances into account if they believe it to be true. *Ib.*
7. *Expenses.*] In ascertaining the ratable value of a portion of a railway in any parish, the amount at which the company is rated in another parish cannot be taken into consideration. But any expenses, wherever arising, which are shown to be necessary for keeping the hereditament in the parish at the value which is made the measure of the assessment, may properly be taken into consideration in arriving at that value. *Ib.*
8. *Parochial Earnings.*] There is no insuperable difficulty in applying the principle of parochial earnings to the rating of railways, as companies are bound to afford to parish officers the means of laying the rate fairly. *Ib.*
9. *Deduction.*] A railway company is entitled to an annual deduction from the ascertained value of their occupation, in order to countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the supposed rent, according to the principle upon which such a deduction is allowed in all cases of property of a perishable nature. *Ib.*
10. *Deduction.*] Such a deduction is not included in the working expenses of the railway. *Ib.*
11. *Deduction.*] The company will not be disentitled to this deduction, because no annual charge for the purpose as meeting the depreciation has, in fact, been made on their receipts, either by way of outlay or setting apart any sum; although such a course ought to be adopted by the company. *Ib.*
12. *Deduction.*] *Semble*, also, that whenever the time arrives for actually making the restoration, the company will be estopped from claiming more than the annual amount of deduction previously allowed to them. *Ib.*
13. *Deduction.*] *Quære*, whether the deduction could be allowed if the company had

defrayed such expenses as had been incurred out of their capital instead of the revenues. *Id.*

14. Rate — Liability to Poor Rates.] The Manchester Concert Hall was built by a society, partly from funds subscribed by eighty individuals who were among its first subscribers, and was held in trust to pay off that amount, and subject thereto in trust for the society. The number of subscribers of five guineas each annually to the society was six hundred, and besides these there was another class called *quasi* members, who paid an annual subscription of two guineas and a half each, and all were admitted by ballot. The annual subscriptions, amounting to about 3000*l.*, went to pay off the above debt and interest, and to meet the current expenses of furnishing the Concert Hall, and supporting the society generally. The Concert Hall was used by the society for concerts and musical entertainments, open to subscribers, and parties admitted by tickets to subscribers, at which music of a high class was generally practised and performed, and for the general business of the society, except on one occasion, in 1848, when the use of the hall was given gratuitously by the society for the charitable purpose of a public concert, on behalf of the funds of the Manchester Royal Infirmary. Each subscriber was entitled to tickets of admission to every public and private concert, which were transferable to ladies generally, and to gentlemen and *quasi* subscribers, subject to certain restrictions. Each subscriber might also give orders for the admission of four persons to the private or undress concerts. The *quasi* subscribers were each entitled to admission, without ticket, to the private or undress concerts. Most of the vocal and instrumental performers were paid out of the amount subscribed, which was also expended in the purchase of music for the society's use. A highly skilled professor of music was induced to settle and remain in Manchester, solely because of the existence of the society, the tendency of which had been to promote and improve the science and practice of music in Manchester and the neighborhood. No dividend or bonus in money had ever been made to any of the members, and the rules of the society provided that in the event of a dissolution, the funds, after payment of all debts, should be applied to the promotion and encouragement of music:—

Held, that the society could be regarded only as a musical club, the primary object of which was the gratification and amusement of the members and their families, and therefore not entitled to an exemption from poor rates, as a society instituted for the purposes of the fine arts exclusively, within the 6 & 7 Vict. c. 36:—

Held, also, that had the society been otherwise entitled to the exemption, the accidental use of the hall for the benefit of the Infirmary, in 1848, would not have affected the right of exemption. *Regina v. Brandt*, 323.

15. Rate — Exemption from Poor Rate.] The building of the Royal Manchester Institution was erected by the subscriptions of shareholders, and vested in trustees, upon trust to permit it to be used for the purposes of literature, science, and the fine arts; lectures were given there on literary and scientific subjects, to which strangers were admitted gratuitously on application to the council. At the meetings literary and scientific papers were read, the reader having the power to invite twenty friends, and the leading literary and scientific persons in the neighborhood having free admission. Rooms in the institution were devoted to the exhibition of paintings, and artists were assisted in the sale of their works without any view to profit on the part of the society. There was likewise a museum for antiquities and specimens of natural history. The expense was chiefly defrayed by the subscription of the members. This being *prima facie* a society exempted from liability to be rated, within stat. Vict. c. 36:—

Held, that it was no objection either,—

1. That part of the building was let to tenants, exemption not being claimed for that part, and the rents received from the tenants forming part of and being applied as the general funds of the society; or,—
2. That the society deducted 5*l.* per cent. on the price of paintings sold at the exhibition which came from a distance, the percentage being applied to, but not sufficing to defray, the expense of the carriage of those paintings, which was paid by the society; or,—
3. That strangers were admitted to the exhibition of paintings on payment of a small fee, that being applied to the purposes of the society; or,—

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4. That the deed of settlement declared that the building was to be used for the exhibition of works of art, &c., for the delivery of lectures on subjects of science, literature, or the arts; "and otherwise for the imparting and diffusing of education and knowledge consistent with the general purposes of the institution," because such declaration did not authorize any other purposes than those of science, literature, and the fine arts; or, —

Lastly, that the deed of settlement declared, that upon a dissolution of the society, the property belonging to it was to be sold, and the proceeds, after payment of debts, to be divided among the members, because such declaration only expressed a power which impliedly belonged to the members, and it did not appear to have been inserted with any view of profit. *Regina v. The Overseers of Manchester*, 314.

ASSUMPSIT.

Against Commissioners.] Where commissioners under a local act have power to appoint officers at a salary to be paid out of the rates raised, the appointment does not create a contract on the part of the commissioners to pay the salary. Therefore, an *indebitatus* action will not lie against them for salary; but a *mandamus*, or an action on the case, is the proper remedy. *Bogg v. Pearce*, 508.

AUCTION.

Employing By-bidders.]

See *WAGERS. FRAUD*, 6, 7.

License of Auctioneer — Revocation.]

See *LICENSE*.

BAILMENT.

Liability of Railway Company as Carriers.] Where a railway company receive goods at one terminus to carry them to another, they are answerable for any loss that may occur between them, although it may be on a line of railway that does not belong to such company; and the receipt of goods so to be carried is *prima facie* evidence of such liability; confirming *Muschamp v. The Lancaster and Preston Junction Railway Company*, 8 M. & W. 421. *Watson v. The Ambergate, &c. R. Co.* 497.

BANKRUPTCY.

1. *Proceeds of personal Labor.*] Debt for work and labor as a surgeon and apothecary, and for medicines found and administered. Plea — The bankruptcy of plaintiff, and that the debt was claimed by the assignees. Replication — That the labor was personal labor bestowed after the bankruptcy, and done for the necessary present maintenance of plaintiff and his family; and the medicines were purchased out of the earnings of his personal labor done after his bankruptcy; and that the medicines were increased in value by plaintiff's personal labor, and were found and administered for the necessary present maintenance of plaintiff and his family. Rejoinder — That the labor was not personal labor, nor the medicines purchased out of the earnings of personal labor, nor the medicines found or administered for the necessary present maintenance of plaintiff and family. Plaintiff was a general medical practitioner; he had filed a declaration of insolvency, and was an uncertificated bankrupt. By an arrangement with a friend, who had purchased his stock of medicines, he continued in possession of them on credit, carried on his business as before, and was supplied with fresh medicines on credit from wholesale houses. Plaintiff attended defendant, giving him the benefit of his skill, and furnishing the medicines which he thought necessary: —

Held, that plaintiff was carrying on his business as a medical practitioner, and therefore the replication was not proved, &c. *Elliott v. Clayton*, 396.

2. *Fraudulent Preference — Right to Property as against a Wrong-doer.*] The plaintiff, having seized the goods of S., a trader, under a *fi. fa.* issued upon a judgment founded on a warrant of attorney previously given to him by S., took an assignment of the goods from the sheriff by bill of sale. The defendants, who were landlords to S., distrained for rent, and seized the goods under such distress whilst the plaintiff was in possession of them. Three days afterwards, S. filed a petition in bankruptcy, on which he was declared a bankrupt, and assignees were appointed. The

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assignees did not interfere with or demand the goods of the plaintiff, but they commenced an action of trover against the plaintiff for the conversion of goods. In an action for excessive distress, brought by the plaintiff against the defendants, the jury found that the warrant of attorney was given as a fraudulent preference of the plaintiff over the other creditors, in contemplation of bankruptcy:—

Held, that the property in the goods vested in the plaintiff by the bill of sale, subject to be divested by the assignees; and that, as the assignees had not interfered, the plaintiff was the owner of the goods, and the defendants, being wrong-doers, could not set up the title of the assignees to defeat the plaintiff's action. *Newnham v. Stevenson*, 512.

3. *Certificate of*]

See ARREST, 4.

BETTING.

See WAGERS.

BILLS OF EXCHANGE.

1. *Consideration — Payment to Drawer.*] To an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded that J. H., the drawer, indorsed the bill to the plaintiff without value or consideration, and that the plaintiff always held it without value or consideration, and that after the bill became due, J. H. accepted certain scrip certificates from the defendant in full satisfaction and discharge of the bill. The plaintiff replied that the bill was indorsed for value and consideration, and upon this issue the defendant had a verdict:—

Held, that the plaintiff was entitled to judgment *non obstante veredicto*. *Milnes v. Dawson*, 530.

2. *Indorsement — Proof of Consideration.*] Where the immediate indorser of a bill of exchange to the plaintiff has parted with the bill in violation of good faith, want of consideration as between him and the plaintiff is presumed, so as to throw upon the plaintiff the *onus* of proving consideration. *Smith v. Braine*, 379.

3. *Assumpsit on a bill of exchange by indorsee against acceptor.* Plea—That the bill was drawn for the accommodation of defendant, and in order that he might get the same discounted, and raise money upon it; that it was indorsed by the drawer in blank, and delivered to defendant for that purpose, who, before the bill became due, delivered it to W. M., for the special purpose of getting the same discounted for defendant; that W. M. delivered the bill to W. C. for the purpose aforesaid, but that W. C., in violation of that purpose, and against good faith, and without the authority or knowledge of defendant or of W. M., and without consideration or value, indorsed the bill to plaintiff:—

Held, that defendant, having proved that the bill was indorsed by W. C. to plaintiff, in violation of the purpose for which he received it, and against good faith, and without the authority of W. M. or of defendant, was entitled to a verdict on that plea, unless plaintiff proved that he had given consideration for the bill. *Id.*

4. *Evidence — Protesting foreign Bill.*] Although to make a party to a foreign bill liable to a person who takes up such bill for his honor, it is necessary that a formal protest should, previously to so taking up the bill, have been made before a notary, that the payment was made for the honor of such party, yet it is not necessary that such protest should be formally drawn up at the time of such payment, even in the case of payment for the honor of a drawer or indorser. The instrument may be drawn up at any time afterwards, if before trial.

The case of *Vandercall v. Tyrrell*, 1 Moo. & M., 87, explained. *Geralopulo v. Wieler*, 515.

5. *Gaming — Illegality.*] To an action against the acceptor of a bill of exchange, drawn by the plaintiff, the defendant pleaded that a bet was lost by the defendant to A B, and that the said bill of exchange was, at the request of A B, given and accepted by the defendant in consideration of the said bet, and to secure payment thereof, contrary to the statute, &c., and that there never was any other consideration for the acceptance of the said bill, and that the plaintiff, at the time when he drew and the defendant accepted the same, had notice of the premises. The evidence

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was, that the defendant had accepted a prior bill drawn by the plaintiff in consideration of the bet lost to A B, and that the bill sued upon was given in renewal of that prior bill. The jury found that the bill declared upon was given in consideration of the bet, and that the plaintiff had notice of it:—

Held, that the plea was proved:—

Held, also, that the plea was a good answer to the action under the 5 & 6 Will. 4, c. 41. *Hay v. Ayling*, 416.

6. *Acceptance on behalf of Company.*] A bill of exchange drawn upon a completely registered joint-stock company by its corporate name, was accepted as follows: "Accepted, J. B. and E. N., directors of the C. Company, appointed to accept this bill." J. B. and E. N. were, in fact, directors of the company. The corporate seal, having the name of the company inscribed, was also affixed to the bill, and it was countersigned by the secretary:—

Held, that the bill of exchange was sufficiently expressed to be accepted by J. B. and E. N. on behalf of the company within 7 & 8 Vict. c. 110, s. 45. *Halford v. Cameron's, &c., R. Co.*, 309.

BILL OF PARTICULARS.

See PLEADING, 5.

BRIBERY.

See FRAUD, 6, 7.

BRIDGE.

Liability to repair.]

See COUNTY, 1.

BURGESS.

Councillor.] The defendant, in an action for penalties under the stat. 5 & 6 Will. 4, c. 76, s. 53, for acting as a councillor of a borough after he had ceased to be qualified, had been an inhabitant householder in the borough during the whole time required by the act. He had also, during the whole time, been rated for certain premises by name, by the name of a public house, but which premises consisted of the house, with a warehouse and yard attached. In the middle of the required time the defendant let the public house, and removed to another dwelling, but retained the warehouse in his own occupation. The defendant gave notice to the parish officers of his change of residence, and required to be newly rated, but no change was made, in time, in the entry in the rate book. The defendant had paid all the rates which were due. At the Registration Court, before the mayor and assessors, in October, 1848, after the change of residence of the defendant, there was an objection taken to his name upon the burgess list, for that his qualifying property was wrongly described; and the objection was allowed, and his name struck off the burgess roll. Afterwards the defendant acted as a councillor:—

Held, that nevertheless the defendant was not liable to a penalty, since he was, at the time he acted as councillor, a person so qualified, within the borough, as to be entitled to be upon a burgess list; and in an action for penalties under the statute, the question is not whether, at the time he acted, defendant was or was not a burgess, or was or was not inserted in the burgess roll or in a burgess list, but whether, at the time he acted, he was or was not a person so qualified, within the borough, as to be entitled to be upon a burgess list of it. *Whalley v. Bramwell*, 374.

BY-BIDDERS.

See FRAUD, 6, 7.

CASE.

For Salary of public Officer.]

See ASSUMPSIT.

CASES DOUBTED, APPROVED, &c.

Lyons v. Barnes, 2 Starkie, 39, and *Iley v. Frankenstein*, 8 Scott, N. R. 839, doubted. 311.

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Boulton v. Coghlan, 1 Bingham, N. C. 640, approved. 416.
Heath v. Sansom, 2 B. & Ad. 291. *Brown v. Philpot*, 2 M. & R. 285, disapproved. 379.
Taylor v. Henniker, 12 Ad. & El. 488; 4 Per. & D. 242; 4 Jur. 719, overruled. 482.
Wagstaffe v. Darby, Barnes, 366, disapproved. 493.
Muschamp v. The Lancaster and Preston Junction Railway Company, 8 M. & W. 421, confirmed. 497.
Vanderwall v. Tyrrell, 1 Moody & Malkin, 87, explained. 515.

CHANCERY.

See WILL, 1.

COMMISSION.

Costs of, to examine Witness.]

See COSTS, 1.

COMMON CARRIER.

Liability of Railway Company.]

See BAILMENT.

COMPANY.

Liability of Husband for Wife's Shares—*Member of the Company under Stat. 7 Geo. 4, c. 46.*] The defendant's wife, before marriage, was possessed of, and registered as the owner of, some shares in a joint-stock banking company. After her marriage, her maiden name remained on the list of shareholders; and she then, though without her husband's knowledge, received dividends and paid calls in respect of these shares. The defendant never did any act to take to himself the benefit of the shares, or to have them transferred into his own name, or to sell them; on the contrary, he refused to have any thing at all to do with them. The company's deed of settlement provided, that the husband of a female shareholder should not be a member of the company in respect of the shares of his wife vested in him by the marriage; but that he might either sell them, or, on complying with certain provisions of the deed, have them transferred into his own name, and then become a member of the company:—

Held, that on a judgment recovered against the public officer of the company, a *sci. fa.* to levy execution under stat. 7 Geo. 4, c. 46, s. 13, can only issue against those who are members of the company according to the provisions of the deed of partnership; and that as the defendant had not complied with those provisions, he was not liable to a *sci. fa.* as a member of the company in respect of his interest in his wife's shares. *Dodgson v. Bell*, 542.

CONCEALMENT.

See FRAUD, 3, 4, 5.

CONDITION.

Breach of.]

See PLEADING, 6.

CONSIDERATION.

Proof of.]

See BILLS OF EXCHANGE, 2.

Mutual Promises.]

See CONTRACT.

Illegal Transaction—*Gaming.*]

See BILLS OF EXCHANGE, 5.

CONSPIRACY.

See FRAUD, 6, 7.

CONSTRUCTION.

Of Statutes.]

See ORDER OF JUSTICES. HIGHWAY. WRIT. COSTS, 2, 3.

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Of Marine Insurance Policy.]

See INSURANCE.

Of Contract.]

See CONTRACT.

Of Will.]

See WILL, 1.

"Or" not construed "and."]

See WILL, 3.

CONTRIBUTORY.

See COMPANY.

CONTINUANCE.

See DEEDS, 6.

CONTRACT.

1. *Corporation — Contract not under Seal — Estoppel.]* In an action of *assumpsit*, the declaration stated, that in consideration that the plaintiffs would sell to the defendants iron rails, the defendants agreed to furnish to the plaintiffs sections of the said railways, averring mutual promises, and alleging as a breach the non-delivery of the sections by the defendants. It appeared that the plaintiffs were incorporated by a charter, for the purpose of carrying on the business of copper miners, and that the contract in question, which was not under seal, had been made by an agent on behalf of the plaintiffs with the defendants: —

Held, that the action could not be maintained by the corporation, as the contract was not under seal, and did not fall within any of the exceptions to the general rule, that a corporation can only bind itself by deed.

That the contract was not incidental or ancillary to carrying on the business of copper miners, and was therefore not binding on the corporation.

That no other charter authorizing the company to deal in iron could be presumed to exist, the charter which was given in evidence not supporting such an authority.

That, as the corporation could not be sued upon this contract, and as the alleged promise by them formed the consideration for the defendants' promise, the corporation could not sue upon the contract. *Copper Miners' Co. v. Fox*, 420.

2. *Estoppel.]* *Semble*, that the doctrine cannot be supported, that a corporation may sue as plaintiffs upon a simple contract, upon the ground that by so doing they are estopped from objecting that the contract was not binding upon them. At all events, such an estoppel could only support an action of covenant, as upon a contract under seal. *Ib.*

3. *Construction.]* An agreement, dated the 12th of December, between the plaintiff and the defendant, who carried on the business of a puller of wool, stipulated that the defendant should sell to the plaintiff what he might pull up to the 6th of January, "say not less than 100 packs of wool."

Held, (*dissentiente Coleridge, J.*), that in the absence of an averment that the word "say" had any peculiar meaning, the agreement imported that the defendant should pull and supply to the plaintiff 100 packs as a minimum during the specified period, and that the plaintiff should take any further quantity which should be pulled by the defendant during the period. *Leeming v. Smith*, 365.

4. *Gaming — Illegality.]*

See BILLS OF EXCHANGE, 5.

5. *By Commissioners in appointing Officers.]*

See ASSUMPSIT.

6. *Conditional Sale.]*

See SALE.

CONVERSION.

Justification, under Judgment and Execution.]

See PLEADING, 2, 3. WILL, 1.

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CORPORATION.

Liability on Contract not under Seal.]

See CONTRACT, 1.

COSTS.

1. *Witness — Taxation of Costs.*] The omission to state time and place, both in the order for a commission to examine a witness under the 1 Will. 4, c. 22, and in the commission itself, amounts, at most, to no more than an irregularity. Where, therefore, upon such a defective proceeding being obtained solely at the instance of the plaintiff, the attorneys on both sides had agreed between themselves to a certain time and place, at which the examination under the commission took place, and the witness was then and there cross examined on behalf of the defendant, and afterwards, at the trial of the cause, certain letters proved under the commission were put in evidence without objection:—

Held, that the defendant could not take advantage of the defect in the proceedings, so as to deprive the plaintiff of the costs of such commission allowed him upon taxation. *Hawkins v. Baldwin*, 452.

2. *Witnesses — Travelling Expenses.*] Under the directions to taxing officers of Hil. Vac. 4 Will. 4, the allowance to witnesses for travelling is to be the expenses actually paid, not exceeding 1s. per mile, unless under special circumstances:—

Held, that the masters are bound to allow only what has been reasonably expended by the witnesses, not exceeding 1s. a mile, and that they cannot look to what has been paid by the party to the witnesses for their travelling expenses. *Hunter v. Liddell*, 454.

3. *By Order of Judge.*] The provision in the 13 & 14 Vict. c. 61, s. 13, that in the cases therein specified “the court or judge may direct that the plaintiff shall recover his costs,” is permissive, not imperative. *Jones v. Harrison*, 579.

4. *On Appeal by Husband and Wife.*] In an appeal by husband and wife, the court will order security for costs against the husband. *Belson*, in re, 49.

5. *Notice of Taxation of, left at Attorney's Office after his Decease.]*

See PRACTICE, 6.

6. *Security for Payment of:]*

See PRACTICE, 9.

7. *Taxation of:]*

See PRACTICE, 10.

8. *Charges of Arbitrators.]*

See ARBITRATION, 1, 6.

9. *Of a Reference.]*

See ARBITRATION, 2.

COUNCILLOR.

See BURGESS.

COUNTY.

1. *Non-repair of Bridge — Liability of County.*] By stat. 2 & 3 Will. 4, c. 64, s. 26, it is enacted, that the isolated parts of counties in England and Wales, which are described in schedule (M) of the act, shall, as to the election of members to serve in Parliament, be considered as forming parts of the respective counties and divisions which are respectively mentioned in the fourth column of the said schedule in conjunction with the names of such isolated parts respectively. The schedule in the first column described that which, in the second column, it called an isolated part of the parish of G. as belonging to Brecknockshire, and then stated in the third column that such part was locally situated in Brecknockshire or Radnorshire, and then in the fourth column named Brecknockshire as the county to which it was to be transferred.

By stat. 7 & 8 Vict. c. 61, it is enacted, that every part of any county in England and Wales, which is detached from the main body of such county, should be considered, for all purposes, as forming part of that county of which it is considered a part for election purposes, by stat. 2 & 3 Will. 4, c. 64.

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Upon an indictment against the inhabitants of Brecknockshire for non-repair of half a bridge, it was found, upon a special verdict, that the mid-channel of the River Wye had always formed the boundary between the counties of Brecon and Radnor, above and below, and partly within, the parish of G., but that before the passing of stat. 2 & 3 Will. 4, c. 64, the boundary receded, at a certain point within the parish, from the mid-channel, to the right bank of the river, and thence inland, at a slant, and then back to the mid-channel of the river, so as to include within Radnorshire a part of the river, and 470 acres of land, on its right bank, part of the parish of G. The special verdict then found that no other portion of the parish of G., on the right bank of the Wye, than the said 470 acres, ever was in the county of Radnor, and that no part of the said parish of G., which up to the passing of the stat. 2 & 3 Will. 4, c. 64, was situate in the county of Radnor, was isolated or detached from the remainder of the said county, unless it was the said portion of 470 acres. The special verdict further found, that the indicted bridge was within the parish of G., and crossed the River Wye between the points where the old boundaries of the counties of Radnor and Brecon left and returned to the mid-channel of the river, and that the only part of the bridge which was out of repair was that extending from the mid-channel to the right bank of the river:—

Held, that the inhabitants of Brecknockshire were liable to repair half the bridge, since it stood half in their county and half in Radnorshire; for that, upon such finding, it was clear that the 470 acres were the part of the parish of G. which was intended to be described in stat. 2 & 3 Will. 4, c. 64, as isolated from the main body the county of Radnor, and therefore to be transferred to the county of Brecon, though, in strictness, it was not isolated, but touched the remainder of the county on one side, and though it was inaccurately described in the first column of the schedule as belonging, at the time of the passing of the act, to Brecknockshire:—

Held, further, that the acts transferred to Brecknockshire not only the 470 acres, but also half the river, where it abutted upon them, so as to make the boundary between the counties of Radnor and Brecon run, there as elsewhere, *per medium filum aque*. *Regina v. The Inhabitants of Brecknockshire*, 402.

2. *Division of County into Districts — Compensation.*] The 7 & 8 Vict. c. 92, enables the queen by order in council to direct that any county shall be divided into districts, to each of which a separate coroner is to be appointed; and by section 6, where "any such county has been customarily divided into districts for the purpose of holding inquests during seven years before the passing of the act, and it shall seem expedient to her majesty that the same division of the county be made under the act, each of such districts shall be assigned to the coroner usually acting in and for the same district; but if it shall appear expedient to her majesty that a different division of such county be made, and any coroner shall present a petition praying for compensation for the loss of his emoluments arising out of such change, her majesty may direct the lords of the treasury to assess the amount of such compensation:"—

Held, that the power to direct compensation to be assessed extended only to those cases where a county had been customarily divided into districts for seven years before the passing of the act, and where a different division is ordered under the act. *Regina v. Lechmere*, 413.

COUNTY COURT.

1. *Jurisdiction of.*] A question whether certain tolls, claimed under an act of Parliament, should be paid in advance or not, does not involve the title to tolls, so as to oust the jurisdiction of a judge of a county court, under the stat. 9 & 10 Vict. c. 95, s. 58. *Hunt v. The Great Northern R. Co.*, 491.
2. *Mandamus to Judge of.*

See PRACTICE, 1.

COURT OF RECORD.

See WRIT.

DAMAGES.

Measure of.] A prize had been offered for the best plan and model of a machine for

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loading colliers from barges, and plans and models intended for the competition were to be sent by a certain day; the plaintiff sent a plan and model accordingly by a railway, but through negligence it did not arrive at its destination until after the appointed day:—

Semble, by *Erie, J.*, the proper measure of damages in such a case is the value of the labor and materials expended in making the plan and model, and not the chance of obtaining the prize, as the latter is too remote a ground for damages. *Watson v. The Ambergate &c., R. Co.*, 497.

DEEDS.

1. *Set aside for Fraud.*] Deeds will not be set aside after thirty-seven and thirty-nine years from their dates, on the grounds of misrepresentation and concealment, unless the averments in the pleadings and proof of fraudulent representation and concealment are precise in their character. *Irvine v. Kirkpatrick*, 17.
2. *Lapse of Time after Fraud.*] Although length of time be no bar to fraud, yet it is a circumstance to be taken into consideration by the court in forming its judgment; and this is consonant both to the law of England and Scotland. *Ib.*
3. *Misrepresentation.*] *Semble*, that where a party communicates the effect of one of two opinions given by separate counsel, withholding the one which is opposed to his own interest in the subject matter of the case, it is both misrepresentation and concealment. *Ib.*
4. *Misrepresentation.*] A conjectural estimate of what may be the value of an estate is not a misrepresentation. *Ib.*
5. *Concealment.*] Concealment, to be fraudulent and material, must be a concealment of something that the party concealing was bound to disclose. *Ib.*
6. *Practice.*] The reasons and arguments of a peer on advising the house to a particular judgment to be given, may be continued from one day to another. *Ib.*

DEPOSITIONS.

See COSTS, 1.

DEVISE.

See WILL, 1, 2, 3.

DISCHARGE.

Effect of, by Plaintiff.]

See ARREST, 4.

DISTRESS.

1. *Notice of.*] A notice of distress stated "that by virtue of an authority to me given, &c., I have seized the goods, chattels, and effects specified in the schedule hereunto annexed, for the sum of 170*l.* due," &c. The schedule specified certain goods, and concluded thus: "And all other goods, chattels, and effects that may be found in and about the said premises, that may be required in order to satisfy the above rent, together with the expenses:"—
Held, that this notice did not justify the seizure of any goods besides those specified in the schedule. *Kerby v. Harding*, 574.
2. *Abandonment of.*] A distrained for rent due from his tenant B, a livery stable keeper, and took a pony and carriage belonging to one of B's customers. While the broker was in possession, the owner, who was ignorant of the distress, was allowed to take his pony and carriage out as usual, the broker believing that he would bring them back:—
Held, that this was not an abandonment of the distress, and, the owner having brought them back, they were still subject to the distress. *Ib.*
3. *Distress for too large a Sum.*] Declaration in case alleged as the cause of action, first, that defendant took certain goods as a distress for certain arrears of rent then claimed and pretended by defendant to be due to him, whereas part only of the rent was due; and, secondly, that he wrongfully sold the said goods, as such distress, for the said alleged arrears and costs:—

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Held, first, that the allegation as to the sale could not be understood as charging that more goods were sold than were necessary to raise the amount of the arrears actually due, and costs.

Secondly, that the making a distress for rent, some rent being due, accompanied by an untrue claim or pretence that more was due than really was due, is not actionable. *Tancred v. Leyland*, 482.

4. *Of Machines fixed to Building.*] The defendant, being the landlord of certain premises occupied by the plaintiff, seized as a distress for rent certain cotton spinning machines, which were fixed by screws, some into the wooden floor, and some into lead which had been poured in a melted state into holes in the stone for the purpose of receiving the screws. The machines having been replevied by a replevin issued out of the Honor Court of Pontefract, the defendant entered and seized them a second time:—

Held, that the machines never became part of the freehold, and were distrainable. *Hellawell v. Eastwood*, 562.

See ADMISSIONS.

EXECUTOR.

Power to sell Real Estate.]

See WILL, 2.

ESTOPPEL.

See CONTRACT, 1.

ESTATE TAIL.

See WILL, 3.

EVIDENCE.

1. *Lease — Presumption of the Execution of Counterpart.*] In an action of debt for rent on a demise, the plaintiff produced a deed properly stamped as a counterpart lease, and proved the same to have been executed by the defendant:—

Held, that although there was no evidence of any lease having been executed by the plaintiff, the presumption was that there was such; and the deed produced was therefore rightly admissible as a counterpart. *Hughes v. Clark*, 528.

2. *Competency of Witness.*] A creditor, who is a party to a deed of assignment by his debtor to a trustee for creditors, is a competent witness for the trustee in an action to enforce the deed. *Black v. Jones*, 559.

Bills of Exchange — Illegality.]

See BILLS OF EXCHANGE.

Privileged Communications — Evidence of Malice.]

See PRIVILEGED COMMUNICATIONS, 1. ADMISSIONS.

Commission to examine Witness.]

See WITNESS.

FOREIGN SECURITIES.

See WILL, 1.

FRAUD.

1. *How plead.*] Deeds will not be set aside after thirty-seven and thirty-nine years from their dates, on the grounds of misrepresentation and concealment, unless the averments in the pleadings and proof of fraudulent representation and concealment are precise in their character. *Irvine v. Kirkpatrick*, 17.

2. *Lapse of Time.*] Although length of time be no bar to fraud, yet it is a circumstance to be taken into consideration by the court in forming its judgment; and this is consonant both to the law of England and Scotland. *Id.*

3. *Misrepresentation.*] *Semble*, that where a party communicates the effect of one of two opinions given by separate counsel, withholding the one which is opposed to

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his own interest in the subject matter of the case, it is both misrepresentation and concealment. *Ib.*

4. *Opinion.*] A conjectural estimate of what may be the value of an estate is not a misrepresentation. *Ib.*
5. *Concealment.*] Concealment, to be fraudulent and material, must be a concealment of something that the party concealing was bound to disclose. *Ib.*
6. *Bidding at Auction.*] Where two parties enter into a wager as to the price of opium at a certain sale, each knowing that the other would use means to influence the price, it is no fraud on one party that the other party raises the price by bidding at such sale. *Doolubdass v. Ramlohl*, 39.
7. Employing agents to bid for such a purpose is not an unlawful conspiracy. *Ib.*
8. A having a right to purchase a certain quantity of opium at a sale, no fraud on the vendors is committed by bribing the agent of A to exercise that right. *Ib.*

FRAUDS.

Statute of.

See PLEADING, 1.

GAMBLING.

See WAGERS.

GAMING.

Consideration of Bills of Exchange.

See BILLS OF EXCHANGE, 1, 2.

HABEAS CORPUS.

In Island of Jersey.] A writ of *habeas corpus*, issued by the lord chancellor, and sealed by the chief clerk of the records and writs with the official seal, will run into the Island of Jersey; and the Royal Court there is bound to register such writ, and to aid and assist in its execution. *Belson*, in re, 49.

HIGHWAY.

1. *Turnpike Act, Construction of.*] A turnpike act, passed in 1840, and which was to be in force for thirty-one years, provided that it should not be lawful to continue or erect any turnpike gate across the roads in the town of T., or in any other town through or into which the said roads might pass or be made:—
Held, that the prohibition extended to the erection of a gate within the limits of the town of T. as it existed at any time during the operation of the act, and not merely at the time when the act passed. *Regina v. Cottle*, 474.
2. *"Town."*] On the trial of an indictment against the turnpike trustees for erecting a gate within the town of T., the judge directed the jury that the word "town" was to be taken in its popular sense of a collection of houses, and that they were to consider whether the spot where the gate stood was so surrounded by houses that the inhabitants might fairly be said to dwell together, the fact of the houses being separated by gardens not preventing them from lying together:—
Held not to be a misdirection. *Ib.*

HUSBAND AND WIFE.

When Husband liable for Costs.

See COSTS, 1.

ILLEGALITY.

Effect of illegal Consideration.

See BILLS OF EXCHANGE, 2.

INDICTMENT.

For Non-repair of Bridge.

See COUNTY, 1.

Common Law, Admiralty, &c.

INDORSEMENT.

*Without Authority.]*See **BILLS OF EXCHANGE**, 2, 3.

INSOLVENCY.

See **PRACTICE**, 10.

INSURANCE.

1. *Seaworthiness, Warranty.]* Assumpsit on a time policy of insurance, commencing on the 25th September, 1843. Plea, that the ship was not, at the commencement of the risk in the policy mentioned, nor at the time of the making of the policy, nor on the 25th September, 1843, seaworthy, or in a fit and proper condition safely to go to sea; but, on the contrary thereof, was wholly unseaworthy:—

Held, after verdict,—

First, that the word “seaworthy” did not necessarily mean that the ship was in a state completely fit for sea navigation, but included in it a fitness for present navigation either on a sea or river, if about to sail or sailing on either, and a condition of repair and equipment fit for such a port, if she was then in port.

Secondly, that the plea was bad, because in a time policy there is no implied warranty or condition that the ship was seaworthy at the commencement of the risk or term, wherever she happened to be, or in whatever circumstances she was placed at the time. *Small v. Gibson*, 299.

2. *Extent of Warranty.]* But, it seems, that in a time policy there may be an implied warranty that the ship is, or shall be, seaworthy for that voyage, if she be then about to sail on a voyage; or that she was in a proper condition for her port, if in port, or if she be at sea, that she was seaworthy when that voyage commenced. *Ib.*

3. *Seaworthiness.]* To an action on a time policy of insurance, commencing on the 25th September, 1843, the defendant pleaded, that the ship was not, at the commencement of the risk, nor at the making of the policy, nor on the 25th September, 1843, seaworthy, or in a fit and proper condition safely to go to sea; whereupon, and upon issue found for the defendant, the plaintiff moved for judgment *non obstante veredicto*: but *held*, that the plea is a sufficient answer to the action. *Small v. Gibson*, 290.

4. *Warranty.]* There is an implied warranty of seaworthiness in time policies, if nothing appear in them to the contrary, as well as in policies of a voyage. [But see *supra*, 1.] *Ib.*

5. *Time Policies.]* The warranty applies, in time policies as well as in policies for a voyage, at the period when the risk commences, and not of necessity at the period when the ship goes to sea. [But see *supra*, 1.] *Ib.*

6. *Warranty—Exception.]* A marine policy was made subject to certain rules, one of which was that ships were not to sail from any of the ports following, between the times set opposite thereto, that is to say, from any port on the east coast of Great Britain between the 5th of October and the 5th of April, to any port in the Belts between the 20th of December and the 15th of February. The plaintiff's vessel sailed, on the 8th of February, for F., a port in the Belts, and was lost:—

Held, in an action by the assured against the insurer, that the rule amounted to a warranty, and not to an exception, and that the plaintiff was not entitled to recover in respect of the loss:—

Held, also, that the word “to,” as used in this rule, meant “towards.” *Colledge v. Harty*, 550.

INTERRUPTION.

*Of Residence.]*See **SETTLEMENT**, 2.

JERSEY, ROYAL COURT OF.

See **HABEAS CORPUS**, 1.

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JUDGMENT.

1. *Non obstante veredicto.*]See **BILLS OF EXCHANGE**, 1. **PLEADING**, 5.2. *Signing Judgment.*]See **PRACTICE**, 10.

JURISDICTION.

Court Baron of the Honor of Pontefract — County Courts Act, 9 & 10 Vict. c. 95.]

The Court Baron of the Honor of Pontefract was an immemorial court, and the lord had power to grant replevins and hold pleas in replevin, and also to hold pleas in all personal actions arising within the jurisdiction up to 40s. By the 17 Geo. 3, c. 16, the jurisdiction was extended to 5*l.*, but there was a proviso that all plaints in replevin should be had and be proceeded in and be removable in the same manner as if the act had not passed. By the 2 & 3 Vict. c. 85, s. 1, after reciting the 17 Geo. 3, c. 15, it was enacted that "the present jurisdiction and practice of the Court Baron of the Honor of Pontefract shall (with certain exceptions) cease and determine, and thenceforth the said court shall be constituted and be a court of record, under the name of the Court of the Honor of Pontefract." The 4th section extended the jurisdiction of the court to 15*l.* The 56th section enacted, that six months after the passing of any general act for the recovery of small debts, the operation of which should interfere with the powers given to the said court by this act, "every clause, matter or thing in the act contained which shall extend or be construed to extend to give to the court hereby appointed any local or separate jurisdiction, shall cease and determine." The act did not specifically mention replevins. By the 9 & 10 Vict. c. 95, s. 5, (the County Courts Act,) power was given to the queen in council to order that any court holden for the recovery of debts under the provisions of certain acts specified in schedules A and B, should be held as a county court, with power to alter or vary the districts, and it provided, "that from and after the time mentioned in any such orders, the act or acts under which such court is now constituted, so far as the same relate to the establishment or jurisdiction or practice of a court for the recovery of small debts, or demands, shall be repealed, but not so as to revive any act thereby repealed;" and the 6th section enacted that as soon as a court should be established under the aforesaid powers, "every act of Parliament, heretofore passed, so far as the same respectively relate to or affect the jurisdiction and practice of the court so established or ordered to be holden as a county court, shall be repealed." By the 119th and 120th sections, actions of replevin are directed to be brought without writ in the courts held under the act, and the plaints are to be entered in the court holden for the district. The 2 & 3 Vict. c. 85, was specified in schedule A, and an order was duly made establishing a county court for the district included within the jurisdiction of the Court of the Honor of Pontefract as modified by that act: —

Held, first, in the absence of evidence that any replevins had ever been issued from the Court Baron of the Honor of Pontefract, except in cases in which there was jurisdiction to try the plaints, that after the constitution of the new county court no replevin could be issued from the Court Baron. *Hellawell v. Eastwood*, 562.

Semble, there may be a franchise of granting replevins independently of the franchise of trying the plaints.

See **COUNTY COURT**.

JURORS.

Too many in the Box.]See **PRACTICE**, 11.

LABOR.

Right to Proceeds of.]See **BANKRUPTCY**, 1.

LEASE.

Execution of Counterpart.]See **EVIDENCE**, 3.

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LICENSE.

Revocation of Authority.] Where the owner of premises, who has employed an auctioneer to sell his goods thereon, revokes his consent to the auctioneer remaining on the premises, the latter has no right to continue there, though he has incurred expenses in allotting the goods, and though he remains only to complete the sale by delivering the goods to the purchasers. *Taplin v. Florence*, 520.

LIMITATIONS.

When a Bar to Fraud.]

See DEEDS, 2. PRACTICE, 2.

MACHINES.

When distrainable.]

See DISTRESS, 4.

MANDAMUS.

To compel Payment of Salary.]

See ASSUMPSIT.

To Judge of County Court.]

See PRACTICE, 4.

Return to.]

See RAILWAY COMPANY, 2.

MAGISTRATES.

Jurisdiction of.]

See TRESPASS.

MISREPRESENTATIONS.

See FRAUD, 1, 3, 4, 5.

MONEY HAD AND RECEIVED.

Recovery of exorbitant Fee.]

See ARBITRATION, 7.

NEW TRIAL.

Misdirection on collateral Point.] Where a judge, in summing up to the jury, mistakes the law upon a collateral point, upon which a bill of exceptions would not lie, a new trial will not be granted as of right, but the court will exercise its discretion according to its opinion of the result being in accordance with the justice of the case. *Black v. Jones*, 559.

NON-RESIDENT.

Security for Costs.]

See PRACTICE, 9.

OPIUM.

See FRAUD, 6, 7, 8.

OPINION.

Withholding, when Fraud.]

See FRAUD, 3.

ORDER OF JUSTICES.

Validity of.] The 34 Geo. 3, c. 97, an act for building a new shire hall for the county of Stafford, enacted, sect. 31, that when the said shire hall should be completed it should be forever insured, supported, and maintained at the expense of the county

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of Stafford and the town of Stafford in the proportions following: that one tenth part of the charges should be paid by the mayor, aldermen, &c., of Stafford, and the remainder by the inhabitants of the county; that it should be lawful for the county justices to order the shire hall to be insured, supported, maintained, and repaired as they should think fit, and that they should and might order the expenses of the insurance and repairs to be paid in the proportions before mentioned.

After the completion of the hall, the sum of 1000*l.* was, in pursuance of the act and of an order of county justices, expended in insuring and supporting the hall, and a tenth part thereof ordered to be paid by the mayor, &c., of Stafford, and the remainder by the inhabitants of the county. Subsequently, a further sum of 28*l.* 2*s.* was ordered by the county justices to be laid out in repairing the hall, and a tenth part of that sum was ordered to be paid by the mayor, &c., and the remainder by the inhabitants of the county:—

Held, first, that the mayor, &c., were bound to pay their proportion of the 1000*l.* actually expended, although they had not been summoned to oppose the order of justices, nor had any notice that it was about to be made; and, secondly, that they were bound to pay their proportion of the sum of 28*l.* 2*s.*, although that sum had not been expended before the action. *Hinckley v. Stafford*, 598.

OUTLAWRY.

See ARREST, 3.

PARISH OFFICERS.

See SETTLEMENT, 3.

PARTIES.

See PRINCIPAL AND AGENT, 1, 2.

PAUPER.

Removability.]

See SETTLEMENT, 4

PAYMENT.

Pleading of.]

See PLEADING, 5.

PAYMENT OF MONEY INTO COURT.

Effect of, in Tort.] Payment into court in *tort* has the same effect as payment into court in actions of *indebitatus assumpsit*, namely, that of admitting a cause of action, with damages, amounting to the sum paid into court. *Story v. Fennis*, 548.

PENALTY.

See BURGESS.

PLEADING.

1. *General Issue — Statute of Frauds.*] A plea that the promise sued upon was a promise to answer for the debt of another person, and that there was no agreement or memorandum or note thereof in writing and signed by the defendant, is bad as amounting to the general issue. *Reed v. Lamb*, 570.

2. *Conversion in Fact and wrongful Conversion.*] The plea of not guilty in trover puts in issue not merely the conversion in fact, but the wrongful conversion. The case of *Stanciffe v. Hardwick*, 2 Cr. M. & R. 1; s. c. 4 Law J. Rep. (N. s.) Exch. 161, is in that respect overruled. *Young v. Cooper*, 540.

3. *Justification — Not Guilty.*] To trover for furniture by the assignees of a bankrupt, the defendant justified the seizure under a judgment and execution against the goods of the bankrupt before his bankruptcy:—

Held, on demurrer, that the plea was bad, as amounting to not guilty. *Ib.*

4. *Plea Puts Darrein Continuance.*] In an action on a recognizance of bail, the defendant pleaded two pleas of *nul tiel* record and a plea of payment. The plaintiff

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having obtained judgment on the pleas of *nul tiel* record, the issue on the plea of payment came on for trial, when the defendant offered a plea *puis darrein continuance*:—

Held, that such a plea was receivable, notwithstanding the judgment against the defendant on the other issues. *Wagner v. Imbrie*, 584.

5. *Particulars of Demand*.] The declaration in an action of debt claimed 44*l.* 8*s.* The particulars, after giving credit, stated the balance due from the defendant to be 12*l.* 4*s.* The defendant pleaded payment of 15*l.* in satisfaction, and obtained a verdict:—

Held, that the plaintiff was not entitled to judgment *non obstante veredicto*

Although the court will not judicially notice the particulars of demand, as they are not a part of the record, yet, after verdict, it will take notice that there may be such particulars as will make a plea valid. *Turner v. Collins*, 363.

6. *Assignment of Breach*.] A local act, 26 Geo. 2, c. 61, required the treasurer of the S. M. turnpike roads to give security, and enacted that he should, from time to time, when and as often as he should be required, by the trustees, or any seven or nine of them, produce to them, or seven or nine of them, accounts in writing of all the moneys by him received, &c., and all which, upon a proper balance, should be found due from him, he should pay over to the trustees, or any seven or nine of them, or to such person or persons as they, or any seven or nine of them, should direct or appoint. The General Turnpike Act, 3 Geo. 4, c. 126, s. 77, contained similar provisions as to accounting, except that it provided that the accounting should be to the trustees, or to such person or persons as they should for the purpose appoint. The act 4 Geo. 4, c. 95, s. 46, repealed sect. 78 of stat. 3 Geo. 4, c. 126, and reenacted nearly similar provisions.

An action was brought against the surety, upon a bond executed by him, dated the 31st of December, 1822, the condition of which bond was, that if J. C., the treasurer, under stat. 26 Geo. 2, c. 61, of the S. M. turnpike roads, should duly and faithfully account and pay, according to the direction and true intent and meaning of the said act and of the General Turnpike Act, 3 Geo. 4, c. 126, then the bond to be void. Defendant pleaded the repeal of sect. 77 of stat. 3 Geo. 4, c. 126, by stat. 4 Geo. 4, c. 95, s. 46, and alleged performance by the treasurer up to the time of repeal. Plaintiff replied by assigning breaches, first, that certain persons, trustees, (naming ten of them,) required the treasurer to account to certain persons, (naming them,) these being persons duly appointed by the said trustees for that purpose, and yet, although a reasonable time elapsed, the treasurer did not account, but refused and neglected to do so; and, secondly, that the treasurer received money as treasurer, yet did not truly account for and pay over such money, according to the directions, true intent and meaning of the local act and stat. 3 Geo. 4, c. 126, and according to the tenor and effect and true intent and meaning of the bond. Rejoinder, as to the first breach, alleged performance by the treasurer up to the repeal of stat. 3 Geo. 4, c. 126, and as to the residue of the moneys received, that they were received after such repeal; and as to the other breach, alleged that no part of the moneys came to the treasurer's hands before the repeal of stat. 3 Geo. 4, c. 126:—

Held, on demurrer,—

First, that the replication was bad; for that the first breach was badly assigned, inasmuch as it stated that the treasurer was required, according to stat. 3 Geo. 4, c. 126, s. 77, to account to persons appointed by the trustees for that purpose, whereas, after the repeal of sect. 77 of stat. 3 Geo. 4, c. 126, the treasurer could not be legally so required; and the second breach was badly assigned, because, although it required no aid from stat. 3 Geo. 4, c. 126, and therefore the reference to that statute was surplusage, yet it contained no allegation of a requisition by the trustees to pay or account, which was a condition precedent to any forfeiture for non-compliance, within the other statute, on which the breach must rest—namely, the local statute, 26 Geo. 2, c. 61.

Secondly, that the plea was bad, since, by not answering the alleged non-performance of the condition of the bond subsequent to the repeal of stat. 3 Geo. 4, c. 126, it failed to answer the whole declaration.

Thirdly, that the declaration was sufficient, and the action maintainable, and that the bond might be put in force, notwithstanding the repeal of sect. 77 of stat. 3 Geo. 4,

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c. 126, since, although so much of the performance of the condition as depended upon compliance with sect. 77 of stat. 3 Geo. 4, c. 126, was become impossible, yet there might be a performance of so much of the condition as depended upon the local act, 26 Geo. 2, c. 61. *Davis v. Cary*, 368.

7. *Sci. Facias* — *Pleading*.] *Sci. fa.* against a member of a company completely registered under the Joint-stock Companies Act, 7 & 8 Vict. c. 110, to obtain satisfaction of a judgment and execution against the company, the plaintiff having failed to obtain satisfaction of the said judgment, by execution against the property and effects of the company. Plea — *First*, that due diligence had not been used to obtain satisfaction by execution against the effects of the company, concluding with a verification.

Secondly, that no rule or order of the court or a judge had been obtained for leave to issue the *sci. fa.* Replication to the first plea, that due diligence was used to obtain satisfaction by execution against the property of the company, concluding to the country : —

Held, upon demurrer, that the 68th section of the 7 & 8 Vict. c. 110, was cumulative only, and did not preclude the plaintiff from proceeding by *sci. fa.*, to obtain satisfaction of his judgment from the defendant, under the 66th section : —

Held, also, as to the pleadings, first, that the second plea was bad ; secondly, that the replication was sufficient, and properly concluded to the country. *Marson v. Lund*, 442.

8. *Bills of Exchange* — *Illegality*.]

See BILLS OF EXCHANGE, 5. DISTRESS, 3. PRACTICE.

9. *How Fraud should be pleaded*.]

See FRAUD, 1.

10. *Admission by*.]

See ADMISSIONS.

POLICY.

Warranty upon.]

See INSURANCE, 1, 2, 5, 6.

POOR-LAW.

Commissioners.]

See TRESPASS.

POOR RATES.

1. *Liability to — Ratable Value*.] The Southampton Dock Company's premises consisted in part of the custom-house, rented and occupied by her majesty's commissioners of customs, and a manufactory and several workshops, rented and occupied by the West India Mail Packet Company, and J. W. The company under the 188th section of the Dock Act, which empowered them to build or provide out of their income steamtugs for towing vessels into or out of the docks, from or to Southampton, or to any part of the British Channel, had actually in use a steamtug, which offered considerable advantage to those who used the docks, and was conducive to the general profits of the dock business. It was not, however, indispensable, as other steamboats might have been hired at Southampton for the same purpose, but at less advantage and convenience both to the company and those using the docks. Attached to the freehold, and essential to the business of the company, was certain fixed plant, consisting of cranes, steam engines, shears, derricks, dolphins, and other like ponderous machinery ; which, however, were capable of being detached, as easily and with as little injury to the freehold as tenants' fixtures put up for the purposes of trade and business, and usually valued as between incoming and outgoing tenants : —

Held, upon a case stated as to the extent of the company's liability to be rated to the relief of the poor, —

First, that the 25th sect. of the 13 Geo. 3, c. 50, "for the better regulating the poor, &c., of Southampton," and which provided that every person, whether the landlord or tenant, who should let out his house in separate apartments, or ready furnished to lodgers, should for the purposes of the act be deemed the occupier and liable to

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be rated, did not apply to the part of the company's premises of which they were not the occupiers.

Secondly, that the steamtug must be taken as ancillary to the docks, and a part of the floating capital, and that the expenses of it was a proper deduction to be made, in estimating the amount of the company's assessment to the rate.

Thirdly, that as an allowance to directors for management, another proper deduction to be made was a reasonable amount of remuneration for personal trouble and expense, and for the exercise of the skill and judgment of a supposed lessee of the company in managing the affairs of the docks, independently of the profit on capital employed by him.

Fourthly, that the cranes, steam engines, and other ponderous machinery were properly included in estimating the ratable value of the company's premises.

Fifthly, that no deduction could be made for income tax, in respect of the estimated profit of a supposed tenant of the docks, that not being a tax upon the subject matter rated, but upon the net income of the tenant after paying the rent of the premises. *Regina v. Southampton Dock Co.*, 454.

2. *Exemption from Assessment.*]

See ASSESSMENT, 12.

POWER.

1. *Of Appointment.*]

See TRUST.

2. *Of Sale.*]

See WILL, 2.

PRACTICE.

1. *Amendment of Declaration, after Trial — Statute of Limitations.*] The plaintiff, a customer of a banking firm, having brought an action against the firm, was nonsuited, on the ground of two of the defendants not being members of the firm at the time of the accruing of the cause of action. Negotiations on the subject of the action had been going on for several years, during which the defendants had not questioned their liability to be sued, and in a bill in equity filed by them against the plaintiff after pleading, and before trial, had stated that the liabilities of the previous firm had been transferred to themselves, and further stated who the members of the firm were when the cause of action accrued. The court, to prevent the operation of the statute of limitations, set aside the nonsuit, and gave the plaintiff leave to amend the declaration by striking out the two defendants who had been erroneously included in the action. *Crauford v. Cocks*, 594.

2. *Notice of Claim.*] By the 39th rule of practice for the county courts, the claimant of goods taken under county court process is to deliver a particular of the goods claimed by him, and the grounds of his claim. Such grounds need not appear on the face of them to be valid; and therefore a claim to certain goods, stating that they had been assigned to the claimant by deed, was held to be sufficient, although it did not appear that the deed was good as against creditors. *Regina v. Richards*, 410.

3. *Judge refusing to adjudicate.*] If a judge of a county court refuse to adjudicate upon a claim, under sect. 118 of stat. 9 & 10 Vict. c. 95, in consequence of a mistake as to the sufficiency of a notice or other preliminary matter, a *mandamus* will be granted to compel him to hear and determine the claim. *Id.*

4. *Peremptory Undertaking.*] A peremptory undertaking will not be discharged or enlarged on the ground that it has been discovered, since it was given, that the defendant is insolvent. *Emden v. Dewey*, 409.

5. *Setting aside Proceedings.*] A notice of trial was, on the 10th of August, 1849, given to the defendant's attorney for the first sittings in Michaelmas term. On the 9th of October, the defendant's attorney died. In pursuance of such notice the cause was duly entered, and tried on the 3d of November, when a verdict was found for the plaintiff. On the 8th of November, notice of taxation of costs was given on behalf of the plaintiff, by leaving the same at the deceased attorney's

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- office, the plaintiff being unaware of his death. On the 9th of November, the plaintiff signed judgment for the debt and cost; and in March, 1850, the defendant then being in custody, a detainer was lodged against him. A rule having been obtained to set aside all the proceedings subsequent to the 9th of October, the defendant swearing that he had no notice of any proceedings subsequent to the plea until the detainer was lodged, but omitting to state the time he first received intimation of the attorney's death, the court discharged the rule. *Ashly v. Brown*, 489.
6. *Contradictory Affidavits.*] The court refused to set aside a *distringas* on affidavits contradicting the original affidavit, which was sufficient, if true, on which the *distringas* was obtained. *Whitaker v. Crocker*, 507.
7. *Appeal.*] Upon an appeal from a county court, under the 13 & 14 Vict. c. 61, s. 14, the parties are bound by the case as it is stated for the opinion of the court, and cannot travel out of it.
- On such appeal, only such objections can be raised as were taken at the trial in the county court. *Watson v. The Ambergate, &c., R. Co.*, 497.
8. *Costs — Non-resident.*] A sailor born abroad, having a lodging in this country, will not be required to give security for costs upon an affidavit stating, that after his wages were exhausted he would be obliged to go to sea again, but not showing a domicile abroad. *Drummond v. Tillinghurst*, 477.
9. *Taxation of Costs.*] A writ of summons having issued against the defendant, a summons in bankruptcy was afterwards taken out against him, returnable on the 17th, on which day an order was made by the commissioner, pursuant to the 12 & 13 Vict. c. 85, that the costs of the summons should abide the event of the action. On the 15th of October, a summons was taken out before a judge, returnable on the 17th, for staying proceedings on payment of the debt and costs, and an order for that purpose was made on the 18th. One bill having been taxed in bankruptcy, and the other in this court, the master added them together, and judgment was signed for the amount:—
- Held*, that the judgment was regular. *Webb v. Hewlet*, 539.
10. *Too many Jurors.*] At the trial of a cause by a special jury, it having been discovered during the examination of the first witness that there were thirteen jurors in the box, the judge offered to dismiss one, but the defendant's counsel refusing to consent, and it being impossible to ascertain which of the jurors was sworn last, he discharged the jury, directed the special jurymen to be called over again, and tried the cause by the first twelve that answered:—
- Held* regular. *Muirhead v. Evans*, 587.
- Quere*, whether if it could have been ascertained which of the thirteen men in the box was the superfluous juror, the proper course would not have been to turn him out of the box and let the trial proceed. *Id.*
11. *New Trial for Misdirection.*]

See NEW TRIAL. DEEDS, 6. INFANCY. COSTS, 1. PAYMENT INTO COURT.

PRESUMPTION.

Of the Execution of Instrument.]

See EVIDENCE, 1.

PRINCIPAL AND AGENT.

1. *When Agent may sue as Principal.*] A person contracting as agent for an unknown and unnamed principal may himself sue as principal, unless the defendant relied on his character as agent only, and would not have contracted with him as principal if he had known him so to be. *Schmalz v. Avery*, 391.
2. *Estoppel.*] Declaration in *assumpsit* on a charter party made between the defendant, therein described as the owner of the ship, and S., (the plaintiff,) merchant and freighter, for not taking the cargo on board. Plea, *non assumpsit*. The charter party stated that it was made by the plaintiff as agent for the freighter, and concluded thus: "This charter party being concluded on behalf of another party, it is agreed that all responsibility on the part of S. & Co. ceases as soon as the cargo is shipped." At the trial it was proved that plaintiff was the real freighter:—

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Held, that plaintiff was entitled to sue as principal, notwithstanding the terms, of the charter party. *Ib.*

PRIVILEGE.

See ARREST, 1.

PRIVILEGED COMMUNICATION.

1. *Nature of.*] Privileged communications comprehend all statements made *bona fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the person making them. *Somervill v. Hauskins*, 503.
2. *Evidence of Malice.*] A communication being shown to be privileged, it lies on the plaintiff to prove malice in fact; in order to entitle him to have the question of malice left to the jury, he need not show circumstances necessarily leading to the conclusion that malice existed, or such as are inconsistent with its non-existence, but they must be such as raise a probability of malice, and be more consistent with its existence than with its non-existence. *Ib.*
3. The plaintiff had been a servant to the defendant, and dismissed by him on a charge of theft. He afterwards came to the defendant's house to be paid his wages, and had some communication with the defendant's servants, on which occasion the defendant said to his servants, "I discharged that man for robbing me; do not speak any more to him, in public or private, or I shall think you as bad as him:"—*Held* a privileged communication, and that there was no evidence of malice to go to the jury. *Ib.*

RAILWAY COMPANY.

1. *Award of Compensation.*] A railway company is bound under the 35th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, to take up an award of compensation for land required by the company, and forthwith to furnish a copy to the owner of the land; and it is no good return to a *mandamus* for that purpose, that the company were willing to receive the award and to furnish such copy, but were prevented by reason of the arbitrator's refusal to deliver it up to them without the payment of his fees; there being nothing in the act to affect the arbitrator's common-law right of lien. *Regina v. The South Devon Railway Co.*, 282.
2. *Construction of Cross-road Bridges.*] *Mandamus* commanding the Caledonian Company to construct a public carriage road, and a bridge for carrying the same over the railway, and the approaches thereto, under the obligations contained in the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, and the company's special act, and in conformity with a plan, section, and cross section, deposited with the clerk of the peace, and as therein particularly marked. From the return by the company it appeared, that in making the railway within the deviation line authorized by the special act, a part of the said carriage road and the rates of inclination thereof, as delineated in the said cross section, had been altered, and that it was impossible, consistently with such deviation line, to make and complete the alteration in the said road, in conformity with the rates of inclination delineated in the said plan and section and cross section:—
Held, upon demurrer, that the 14th section of the 8 & 9 Vict. c. 20, applied to the construction of the railway, and not to cross roads; and that the 9th section of the special act, 9 & 10 Vict. c. 249, providing that it should be lawful for the company to construct the bridges for carrying the railways thereby authorized over any roads, of the heights and spans and in the manner shown on the sections deposited, applied only to the heights and spans, and not to the rates of inclination delineated in the sections deposited; and therefore that the *mandamus* could not be supported. *Regina v. The Caledonia R. Co.*, 285.

3. *Liability of, as Carriers.*]

See BAILMENT.

RATE.

Exemption from Assessment.]

See ASSESSMENT, 13.

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REMOVAL.

Place of Settlement.]

See SETTLEMENT, 1.

REPLEVIN.

See JURISDICTION.

RESIDENCE.

Interruption of.]

See SETTLEMENT, 1, 2, 4.

SALE.

1. *Sale or Return.]* Where goods are sold under a contract of "sale or return," they pass to the purchaser subject to an option in him to return them within a reasonable time, and if he fails to exercise that option within a reasonable time, the price of the goods may be recovered, as upon an absolute sale, in an action for goods sold and delivered. *Moss v. Sweet*, 311.

2. *Fraudulent Preference.]*

See BANKRUPTCY, 2.

SCIRE FACIAS.

Against Member of Joint-stock Company.]

See PLEADING, 7.

SETTLEMENT.

1. *Fluctuating Settlement.]* The father of a pauper had gained a settlement in the township of B., on the 6th of April, 1837, by renting a tenement. He had also been the owner of a freehold estate in the township of C. for some years before and down to 1838; and it was admitted, that on the 27th of April, 1837, he had resided and slept for more than forty days upon his estate in C. since the purchase of it, several days' residence between the 6th and 27th of April, 1837, being included in the computation of such forty days. An order for removal of the pauper to C., as the place of his derivative settlement, was obtained on the 28th of November, 1849:—

Held, that the residence in C. had the effect of superseding the settlement gained in B., and of establishing a subsequent settlement in C., to which the pauper might properly be removed. *Regina v. Knaresborough*, 360.

2. *Interruption.]* Where a pauper left a parish, in which she had resided for five years with the assistance given to her by the overseer of the parish, contrary to sect. 6 of stat. 9 & 10 Vict. c. 66, and she afterwards returned to that parish, her absence does not operate to cause an interruption in the residence within sect. 1. *Regina v. St. Marylebone*, 385.

3. *Removal by Parish Officers.]* The Quarter Sessions must find the intent with which parish officers give assistance for the conveyance of a poor person out of their parish; and this court will not infer an intent contrary to law from the facts stated. But this court, in a particular case, stated their opinion, that the Quarter Sessions would be justified by the facts in finding the intent to have been to make the pauper chargeable to the respondent parish, within sect. 6 of stat. 9 & 10 Vict. c. 66. *Ib.*

4. *Removability.]* *Semble*, the irremovability of a widow from the parish, in which she was residing with her husband at the time of his death, for twelve months next after his death, created by sect. 2 of stat. 9 & 10 Vict. c. 66, is destroyed by an interruption in the residence during the twelve months. *Ib.*

SHAREHOLDER.

Liability of.]

See PLEADING.

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STATUTES.

When prospective.] Statutes restrictive of suits on wagers are prospective only, and do not affect transactions which took place before the passing of the act. *Doolub-dass v. Ramsell*, 39.

STATUTES CITED AND EXPOUNDED.

29 Car. 2, c. 3, s. 4.	Frauds,.....	570
9 & 10 Will. 3, c. 15, s. 1.	Order of Reference,.....	492
26 Geo. 2, c. 61. }	Turnpikes,	368
3 Geo. 4, c. 126. }		
13 Geo. 3, c. 50, s. 25.	Liability to Poor Rate,	464
7 Geo. 4, c. 46.	Public Company,	542
1 Will. 4, c. 22, s. 1, 4.	Commission to examine Witness,.....	452, 585
2 & 3 Will. 4, c. 64, s. 26.	County Limits,	402
3 & 4 Will. 4, c. 42, s. 17.	Courts of Record,.....	589
4 & 5 Will. 4, c. 76, s. 105.	Guardians of the Poor,	455
5 & 6 Will. 4, c. 76, s. 53.	Penalty,.....	374
2 & 3 Vict. c. 84, s. 1.	Power of Magistrates,	455
6 & 7 Vict. c. 36.	Assessment.....	314, 323
7 & 8 Vict. c. 61, s. 1.	County Limits,	402
7 & 8 Vict. c. 110, s. 45.	Bill of Exchange,	309
7 & 8 Vict. c. 110, s. 68.	Satisfaction of Judgment,	442
8 & 9 Vict. c. 18, s. 34, 35.	Costs of Award, Delivery,.....	282
8 & 9 Vict. c. 20, s. 14.	Railways,.....	285
9 & 10 Vict. c. 66, s. 6.	Settlement,.....	385
9 & 10 Vict. c. 95, s. 58.	Jurisdiction of County Court,.....	491
9 & 10 Vict. c. 95, s. 5.	County Courts,.....	502
13 & 14 Vict. c. 61, s. 13.	Costs,	579
12 & 13 Vict. c. 105, s. 85.	Costs,	539
12 & 13 Vict. c. 106, s. 86.	Costs,	449

TOLLS.

Toll to.]

See COUNTY COURT.

TOWN.

Construction of the Word "Town."]

See HIGHWAY.

TIME.

When a Bar to Fraud.]

See FRAUD, 1.

TIME POLICY.

Warranty upon.]

See INSURANCE, 1, 2, 3, 4, 5.

TRESPASS.

Action against Magistrates — Trespass or Case.] The poor-law commissioners, in 1837, by an order, directed nine parishes, townships, and places to be formed into a union, called the Pateley Bridge Union, for the administration of the poor laws, and amongst them Bewerley and Dacre, which they treated as two distinct townships. They then directed them to contribute to a common fund, for the purpose of providing a workhouse, &c., and afterwards fixed the proportions payable by each township or place, together with the number of guardians to be appointed for each. In 1848, the chairman and guardians of this union made an order on the plaintiff and three others, as overseers of the parish of Dacre cum Bewerley, (treating the two as one township,) for payment of 500*l.* by way of contribution towards the relief of the poor, &c. This order having been disobeyed, the defendants, who were magistrates, issued their summons to the plaintiff and the other overseers as overseers of Dacre cum Bewerley, and afterwards issued a warrant of distress,

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under which the plaintiff's goods were taken. The defendants tendered evidence that the two places had, from time immemorial, formed one township only. The judge rejected that evidence, and directed the jury that the order of the chairman and guardians was not valid, on the ground that the order of the poor-law commissioners, until removed by *certiorari* and quashed, was final as regarded persons acting under it:—

Held, first, that the 2 & 3 Vict. c. 84, s. 1, gave to the magistrates a power similar to that exercised by them in enforcing a legal poor rate. That the existence of a legal obligation to pay the contribution was a necessary preliminary condition to their having any authority to enforce payment; and that, if no such obligation existed, the magistrates had acted without jurisdiction, and were liable in trespass:—

Held, secondly, *dubitante* Alderson, B., that although the order of the commissioners would have been wrong in ordering three guardians to be elected for Bewerley and two for Dacre, instead of five for the entire township if those places constituted one township, still, that the order, until removed by *certiorari* and quashed, was valid *ad interim*, by virtue of the 4 & 5 Will. 4, c. 76, s. 105, and that the acts of the guardians and the order made by them were valid. *Newbould v. Colman*, 455.

TRIAL.

Notice where Defendant's Attorney dead.]

See PRACTICE, 6.

TROVER.

Conversion in Fact.]

See PLEADING, 2.

TRUST.

General or limited to Children.] M. B. being seized in fee of certain premises and also possessed of certain stock, by settlement prior to her marriage with J. C., assigned the said stock in trust after marriage for her separate use or such person or persons as she should by deed appoint, and conveyed her said real property in trust for herself until her marriage with J. C., and then to her separate use during their joint lives, and after her decease to the use of her husband J. C. for life, and after his death "to the use of the child and children of the said M. B. by the said J. C., or other person or persons, and for such estate and subject to such powers and provisoes as the said M. B. should, notwithstanding her said intended coverture, by deed appoint:—"

Held, that the power of appointment could only be exercised in favor of the child or children of M. B. by J. C., or other after-taken husband. *Beech v. Nall*, 572.

TRUSTEES.

Discretionary Power in.]

See WILL, 1.

TURNPIKE.

See HIGHWAY.

WAGERS.

Statutes against.] Statutes restrictive of suits on wagers are prospective only, and do not affect transactions which took place before the passing of the act. *Doolubdass v. Ramlohl*, 39.

Where two parties enter into a wager as to the price of opium at a certain sale, each knowing that the other would use means to influence the price, it is no fraud on one party that the other party raises the price by bidding at such sale. *Ib.*

Employing agents to bid for such a purpose is not an unlawful conspiracy. *Ib.*

A having a right to purchase a certain quantity of opium at a sale, no fraud on the vendors is committed by bribing the agent of A to exercise that right. *Ib.*

WARRANTY.

In Marine Insurance Policy.]

See INSURANCE.

Of Seaworthiness.]

See INSURANCE.

WILL.

1. *Construction — Annuities — Foreign Security.]* A testator who was possessed of a large personal estate, consisting of various foreign securities, with the exception of a small sum of ready money, bequeathed to his trustees so much of his personal estate and effects as, at the time of his decease, should produce the clear annual income of 1500*l.*; and he directed that the same should be selected, and appropriated, and set apart, as soon as conveniently might be after his decease, by his trustees or trustee, in their uncontrolled discretion; and that the trustees or trustee should stand possessed of the personal estate and effects so to be appropriated, &c., upon trust to pay the interest, dividends, and annual produce thereof, half yearly, to his wife during her life; after her death to sink into the residue; with a direction, that if the interest or dividends should, from any cause, be increased or reduced in amount, his wife should have the increase, or bear the loss. The residue of his estate and effects he gave upon certain trusts for his children, and he gave his trustees or trustee for the time being the fullest discretion to leave his property invested on foreign securities, but with full powers to alter and vary the securities as they should think fit. One executor only proved the will, the others being abroad: he paid the testator's debts, and a legacy given by the will, but, in consequence of disputes arising between the widow of the testator and some of the residuary legatees as to the construction of the will, he declined to exercise his discretion as to appropriating a sufficient amount of the testator's estate to meet the annuity of 1500*l.* given to the widow, and refused to exercise his discretion except under the direction of the Court of Chancery. In consequence of this the annuitant filed her bill to have a sufficient amount of the foreign securities sold, and the proceeds invested in the 3*l.* per cents., so as to yield an annuity of 1500*l.* Wigram, V. C., decided in favor of the annuitant, which decision was affirmed, on appeal, by Lord Cottenham, C.:—

Held, upon the construction of the entire will, *first*, that the gift of the annuity was not a specific gift of so much of the foreign securities as, at the time of the testator's decease, should produce an annual income of 1500*l.* *Prendergast v. Prendergast*, 1. *Secondly*, that the executor and trustee having refused to exercise his discretion as to the appropriation of part of the estate to meet the annuity of 1500*l.*, the Court of Chancery could not exercise any discretion in the matter, but must follow its known rule, and order an investment in the 3*l.* per cents., unless there was some clear direction of the testator to the contrary. *Ib.*

Thirdly, that it was not to be collected from the will, that it was the intention of the testator that the foreign securities should be set apart to provide for the annuity. *Ib.*

2. *Charge of Debts — Estate of Executor.]* E. H., by will, after charging all his real and personal estate with the payment of his debts, funeral and testamentary expenses, and of a certain legacy, gave and devised the rents and profits of all his messuages, tenements, farms and lands, except his Bala houses, to A. H., his wife; and by the same will he gave her the whole of his personal estate, and appointed her sole executrix:—

Held, that the Bala houses passed to the heir at law of E. H., subject in equity to the charge of debts, and that A. H. had no power to dispose of them for the purpose of paying the debts. *Jones v. Hughes*, 554.

3. *Devise — Estate Tail — Power of Sale.]* John W. the elder, being seized in fee of certain freehold estates, by his will, after appointing M. W. and others trustees, and directing the payment of his debts out of his personalty, and giving certain bequests to his wife in lieu of dower, and other directions, devised as follows: "Elevantly, I will that my son John having attained twenty-five years of age be let into possession of all my property real and personal which remains, on this express and unalterable condition, that neither he nor his heirs to the third generation shall have power to sell or mortgage any part of the freehold estate now in my own occupation or in the occupation of S. E. and F. S.; but mark, if the trustees do not

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sell the coal, but mortgage the estate, I empower John or his heirs to sell it, to pay off the mortgage, but not otherwise; and in like manner, I debar him and his heirs from selling or transferring those cottages with cart-house and appurtenances built on the waste now in the occupation of J. H., J. H., R. M., H. M., J. W., and myself, it being my desire that they should be kept in the Westermans' name. Twelfthly, if it should happen that my son John die without leaving lawful issue, it is my will that my daughter Ann have his share, subject to the same restrictions, limitations and exceptions under which he has it. Thirteenthly, now if it should please God to take away both Ann and John under age, or without leaving lawful issue, I give and bequeath to my brother Joseph Westerman and his heirs forever all those cottages and cart-house built on the waste, occupied by R. M. and others, with their appurtenances. Fourteenthly, I order all that is left to be immediately sold; and the will then directed certain payments "out of the moneys arising from such sale."

J. W. the elder was illegitimate, and died in 1826, having had three children, A. W., J. W., and E. W. E. W. died in March, 1826. A. W. survived her father and died in 1829, an infant and unmarried, leaving J. W. the younger, who had not attained the age of twenty-one, her heir at law. J. W. the younger survived the testator, and was his heir at law. The said J. W. the younger attained the age of twenty-five in 1838, and died in April, 1842, leaving two children who died infants in 1844 and 1846 respectively, and by his will he devised all his real estates to J. H. and E. D., their heirs and assigns:—

Held, first, that the devisees of J. W. the younger had no estate in the hereditaments devised by J. W. the elder; secondly, that Joseph Westerman had an estate in fee in remainder, under the 13th clause; and thirdly, that the trustees had the power of sale of the remainder in the other tenements not comprised in the 13th clause, after the death of John. *Mortimer v. Hartley*, 532.

WINDING-UP ACTS.

See COMPANY.

WITNESS.

1. *Commission to examine.*] Under the 1 Will. 4, c. 22, the court or a judge has power to issue a commission to a British colony for the examination of witnesses on interrogatories. *Solaman v. Cohen*, 585.

2. *Travelling Expenses.*]

See COSTS, 2.

WRIT.

Writ of Trial.] *Quære*, whether a writ of trial under the 3 & 4 Will. 4, c. 42, s. 17, can be sent to the judge of a county court held under the 9 & 10 Vict. c. 95: but A judge's order directing such a writ to be issued to the judge of the county court and to be returned by the sheriff, is bad. *Breeze v. Owens*, 589.

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